83-586

No.

OCT 8 1983
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Shell Petroleum N.V.,

Petitioner,

—against—

MICHAEL FRANCHETTI, KENNETH CORY, WILLIAM M. BENNETT, INDIVIDUALLY AND AS MEMBERS OF, AND GERALD H. GOLDBERG, INDIVIDUALLY AND AS EXECUTIVE OFFICER OF, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October 8, 1983

QUESTIONS PRESENTED

Two United States subsidiaries of petitioner Shell Petroleum N.V. ("SPNV"), a Netherlands company, are being assessed by the State of California for franchise taxes computed by a unitary taxation formula on the combined worldwide income of SPNV and its more than 900 affiliates around the world. SPNV seeks to assert in Federal court its rights to challenge such taxation under the Treaty of Friendship, Commerce and Navigation between the United States and the Kingdom of The Netherlands ("the Netherlands FCN Treaty"), the United States Constitution and international law. Under California law, SPNV cannot assert its rights in any California forum, and, if the decision below is allowed to stand, it is unlikely that SPNV or anyone else will be permitted to assert SPNV's rights in any Federal or state forum whatsoever. Additionally, the decision below brings into question the enforceability of this nation's entire complex of treaties of Friendship, Commerce and Navigation.

This case, on the merits, involves important issues relating to state unitary taxation of United States subsidiaries of a foreign parent company which were left unresolved by *Container Corporation of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983). However, the lower Federal courts have thus far barred petitioner from raising such issues on standing and ripeness grounds. The questions thus presented to this Court are:

1. Does SPNV have standing in Federal court to assert that the imposition of such unitary taxation violates its rights under the Netherlands FCN Treaty?

2. Does SPNV have standing in Federal court to assert that the double taxation of its interests arising from the imposition of such unitary taxation violates its rights under the Foreign Commerce Clause, the Due Process Clause and international law?

3. Does SPNV have standing in Federal court to assert that California's burdensome demands (enforced by huge penalties) for extensive information relating to the affairs of SPNV and its worldwide affiliates, which is available if at all only to SPNV, violate SPNV's rights under the Netherlands FCN Treaty, the Constitution and international law?

4. Are SPNV's treaty-based, constitutional and international law claims ripe for adjudication, given California's unrelenting eight-year assertion of unitary treatment for SPNV and its affiliates and its related insistence on such burdensome informational demands?

PARENTS, AFFILIATES AND SUBSIDIARIES OF PETITIONER SPNV

Sixty percent of the shares of petitioner SPNV are owned by Royal Dutch Petroleum Company ("Royal Dutch") and 40% by The "Shell" Transport and Trading Company, p.l.c. ("Shell Transport"). Royal Dutch is a publicly-held Netherlands company, the shares of which are listed on various stock exchanges including the Amsterdam Stock Exchange and the New York Stock Exchange ("NYSE"). Shell Transport is a publicly-held English company, the shares of which are listed on various stock exchanges including the London Stock Exchange and the NYSE. SPNV owns approximately 69% of the shares of Shell Oil Company, a Delaware corporation, the shares of which are listed on various stock exchanges including the NYSE. SPNV also owns approximately 79% of the equity interest in Shell Canada Limited, a Canadian corporation, the shares of which are listed on various stock exchanges including the Toronto Stock Exchange. Other companies in which Royal Dutch and Shell Transport hold equity interests, directly or indirectly, are listed in the Appendix at pages 90a-146a.

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SHELL PETROLEUM N.V.,

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MICHAEL FRANCHETTI, KENNETH CORY, WILLIAM M. BENNETT, INDIVIDUALLY AND AS MEMBERS OF, AND GERALD H. GOLDBERG, INDIVIDUALLY AND AS EXECUTIVE OFFICER OF, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,

Respondents.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Shell Petroleum N.V. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on June 30, 1983.

PRIOR OPINIONS

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 709 F.2d 593, and is reprinted in the Appendix at pages 1a-7a. The judgment of the Ninth Circuit was entered on June 30, 1983, and is reprinted at page 24a. The unpublished Memorandum and Order of the United States District Court for the Northern District of California (Patel, J.) was dated August 4, 1982, and entered and filed on August 5, 1982. An amended opinion was subsequently issued on August 1, 1983, and is reprinted at pages 8a-23a. Final

[1] Pursuant to Supreme Court Rule 40, the incumbent members of the Franchise Tax Board have been substituted for their predecessors, defendants in the action below.

judgment dismissing the action was dated and filed on August 10, 1982, and entered on August 11, 1982, and is reprinted at page 25a.

JURISDICTION

The judgment of the Court of Appeals affirming dismissal of the action was entered on June 30, 1983. By order dated September 15, 1983, Justice William H. Rehnquist extended the time for filing a petition for writ of certiorari to and including November 1, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND TREATIES INVOLVED

Article I, § 8, cl. 3 (Foreign Commerce Clause) of the United States Constitution appears at page 26a.

Article III, § 2 (Federal Judicial Power Clause) of the United States Constitution appears at page 26a.

Amendment XIV, § 1 (Due Process Clause) of the United States Constitution appears at page 26a.

The Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of The Netherlands, entered into force December 5, 1957, 8 U.S.T. 2043, T.I.A.S. No. 3942 ("the Netherlands FCN Treaty"), appears at pages 27a-53a.

STATEMENT OF THE CASE

The issues presented by this petition arise from California's eight-year-long campaign to tax the earnings of petitioner Shell Petroleum N.V. ("SPNV") and its more than 900 Royal Dutch/Shell worldwide subsidiaries and affiliates by applying that state's franchise tax to Shell Oil Company ("Shell Oil") and Scallop Nuclear Inc. ("Scallop Nuclear") on a worldwide unitary basis. The case involves on the merits two crucial issues left undecided by the recent decision of this Court in *Container Corporation of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983) ("*Container*"), namely, (1) whether the "upstream" application of a unitary tax scheme to reach the income of a foreign parent company and its non-United States subsidiaries and affiliates violates the Foreign Commerce and Due Process

Clauses of the United States Constitution and (2) whether such application violates the specific provisions of the Netherlands FCN Treaty.

SPNV's claims have never been heard, however, because the lower courts have held that SPNV does not have standing to raise its treaty-based or constitutional claims and that those claims are not ripe.

STATEMENT OF FACTS

(a) The FCN Treaties.

In the years following the conclusion of World War II, the United States entered into a series of bilateral commercial treaties known as treaties of Friendship, Commerce and Navigation ("FCN treaties"). The primary purpose of those treaties was to provide certain substantive protections for United States commerce abroad, whether conducted by a United States corporation or through the medium of its foreign-incorporated subsidiaries, and reciprocal protections for foreign commerce in this nation.[2] Overall, the United States entered into 23 post-war FCN treaties, 21 of which contained substantially similar provisions.[3] One of such 21 treaties is the Netherlands FCN Treaty, which, *inter alia*, accords certain specific substantive rights to "nationals and companies of [The Netherlands], and to their property, enterprises and other interests".

(b) SPNV and Its United States Enterprises.[4]

SPNV is a company of The Netherlands with its principal place of business in The Hague.[5] SPNV and its affiliated

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[2] *See, e.g.*, Walker, *Treaties for the Encouragement and Protection of Foreign Investment*, 5 Am. J. Comp. L. 229, 232-33 (1956).

[3] To the extent that the specific provisions of the various FCN treaties vary, each of such 21 treaties incorporates the language of all other such treaties through an unconditional "most-favored-nation" clause.

[4] The ensuing remainder of the Statement of Facts is derived from SPNV's complaint and the affidavits submitted on its behalf in connection with its motion for summary judgment and the respondents' motion to dismiss. For purposes of the decision on standing, these facts must be assumed to be true and must be construed in favor of SPNV. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

[5] Sixty percent of the shares of SPNV are held by Royal Dutch Petroleum ("Royal Dutch"), a publicly-held company incorporated

company, The Shell Petroleum Company Limited ("Shell Petroleum Ltd."), together hold, directly or indirectly, investments representing interests in more than 900 other Royal Dutch/Shell companies operating in over 100 countries around the world.

During 1967 to 1976, the years relevant to this action ("the relevant period"), SPNV included among its holdings approximately 69% of the outstanding shares of common stock of Shell Oil, a Delaware corporation.[6] Shell Oil has its principal place of business in Houston. During the relevant period, Shell Oil, directly or through its subsidiaries, conducted business in the United States and in various foreign countries. Shell Oil was qualified to do business in California throughout this period.

During the relevant period, SPNV also indirectly owned all the shares of Scallop Nuclear, a Delaware corporation with offices in New York. Scallop Nuclear, incorporated in 1973, was qualified to do business in California in 1974. Scallop Nuclear's activities consisted solely of its participation in General Atomic Company ("General Atomic"), a California partnership owned equally by Scallop Nuclear and Gulf Oil Corporation ("Gulf Oil"). General Atomic's principal business was the development of high-temperature gas-cooled nuclear reactors. The operations of Scallop Nuclear were financed through capital contributions, the funds for which were provided by SPNV. Scallop Nuclear has never been profitable, and the source of its funding from its inception has been SPNV.

(c) The Board's Application of the Unitary Tax.

Respondents are the members and executive officer of the Franchise Tax Board of the State of California ("the Board").

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in The Netherlands. The remaining 40% of the shares of SPNV are held by The "Shell" Transport and Trading Company, p.l.c. ("Shell Transport"), a publicly-held company incorporated in England. Royal Dutch and Shell Transport also hold 60% and 40%, respectively, of the shares of The Shell Petroleum Company Limited, an English company with its principal place of business in London. None of these four companies is qualified to do business in the United States, and none does business, or has any permanent establishment located, in the United States.

[6] The remaining outstanding shares of Shell Oil common stock were held by more than 30,000 registered stockholders.

The Board is the agency responsible for the administration of California's corporate franchise tax. As administered by the Board, the corporate franchise tax is a "unitary" income tax which measures the state franchise tax liability of corporate taxpayers doing business within and without California by apportioning to California a mathematically determined fraction of the total worldwide income of the "unitary" business of which the taxpayer is deemed to be a part. *See* Cal. Rev. & Tax Code §§ 25120-25140 (West 1979); *Container,* 103 S. Ct. at 2939-40. The California corporate franchise tax rate is then applied to the attributed California income figure to determine the tax due.

(i) *Shell Oil.* For many years prior to 1975, Shell Oil, together with most of its subsidiaries, filed its California franchise tax returns as a consolidated entity. In audits of the tax years prior to 1967, with minor exceptions, the Board accepted Shell Oil and those subsidiaries as the appropriate unitary group. In the audit of the tax years 1967-1971, the Board's agent again initially audited Shell Oil on approximately the same basis as that on which Shell Oil had reported. On August 11, 1975, however, the Board stated its intention to treat the operations of Shell Oil as unitary with the worldwide operations of all Royal Dutch/Shell companies, including SPNV, which are more than 50% owned, either directly or indirectly, by Royal Dutch and Shell Transport. The Board also informed Shell Oil that if Shell Oil chose to contest the Board's novel determination that Shell Oil, its foreign parent and that foreign parent's overseas affiliates were a unitary business for purposes of California's franchise tax, the Board would demand extensive further information regarding the operations of all Royal Dutch/Shell companies.

Shell Oil subsequently notified the Board of its intention to contest the unitary determination, and by letter dated September 22, 1976, the Board made an extensive demand for further information. Most of the demand concerned the business activities of Royal Dutch/Shell companies not doing business in California or the United States. The Board demanded, *inter alia,* a listing, by name and amount, of every crude oil transaction between any of the more than 900 Royal Dutch/Shell companies during the years 1967 through 1971,

detailed information concerning the internal affairs of each of those companies, and a listing of all amounts paid by each Royal Dutch/Shell company to any of the four principal Royal Dutch/Shell service companies existing during the years 1967 through 1971. These questions would require answers covering hundreds of thousands, if not millions, of transactions or items. Shell Oil responded to this demand to the best of its ability. However, most of the information demanded by the Board was not in the possession or control of Shell Oil, and Shell Oil so informed the Board. Notwithstanding this, by letter dated October 18, 1977, the Board made a similar informational demand for the years 1972-1976.

Shell Oil sought to obtain from SPNV the information demanded by the Board regarding Royal Dutch/Shell companies other than Shell Oil. Without conceding the legality of the Board's demand for information, SPNV voluntarily supplied certain information which was available to it,[7] even though large amounts of time and expense were required to provide the responses. Relying in part upon information supplied by SPNV, Shell Oil made extensive informational submissions to the Board.

On December 16, 1977, the Board issued to Shell Oil Notices of Proposed Additional Tax Assessments ("NPAs") for the tax years 1967-1971.[8] An NPA for the tax year 1972 was issued on February 14, 1978. The total proposed additional tax for 1967-1972 was $35,660,909. In arriving at the tax, the Board attributed to Shell Oil in California a portion of the combined income of the Royal Dutch/Shell companies which is equivalent to 92.6% of the consolidated worldwide income of Shell Oil and its subsidiaries for the years 1967-1972, even though only approximately 20% of Shell Oil's property, payroll and sales was located in California. For three of the years, the Board attributed more than 100% of Shell Oil's consolidated income to California, and for one year, the Board attributed

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[7] Much of the detailed information demanded is only available in the records of SPNV's hundreds of affiliates.

[8] Unless protested within 60 days, the NPAs become final assessments on which payment is due.

420% of Shell Oil's worldwide income to California.[9] The NPAs also included penalties of $8,915,228, representing 25% of the proposed total additional tax for those years, assessed on account of Shell Oil's alleged failure to provide the information demanded by the Board concerning Royal Dutch/Shell companies other than Shell Oil. The total amount of additional tax and penalties asserted is $44,576,137.

Shell Oil filed a timely protest of the NPAs for 1967-1972 by letters dated February 13, 1978, and April 10, 1978. Shell Oil contested both the Board's unitary determination and the amounts of the NPAs. By letter dated September 21, 1979, Shell Oil petitioned the Board to restrict its unitary determination to comprise only Shell Oil and those of its subsidiaries which had joined together in filing consolidated Federal tax returns. Although more than five years have elapsed since the protests, the Board has taken no action to abandon or modify

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[9] Set forth below for the years 1967-1972 is a tabular comparison of the total consolidated income earned by Shell Oil and its subsidiaries from all sources as reported to the Internal Revenue Service (after audit adjustments agreed upon by Shell Oil and the IRS), the amount of income attributed by the Board to California on a "unitary" basis, the amount of income so attributed as a percentage of all Shell Oil's consolidated income and the percentage of Shell Oil's property, payroll and sales located in California as reported to the Board:

Years	Shell Oil's Consolidated Worldwide Income as Reported to the IRS (After Agreed Audit Adjustments)	Portion of Combined Income of Royal Dutch/Shell Companies Attributed by the Board to Shell Oil in California	Percent of Attributed California Income to All of Shell Oil's Consolidated Income	Percent of Shell Oil's Property, Payroll and Sales in California as Reported to the Board
1967.....	$152,654,000	$ 81,885,000	53.6%	20.5%
1968.....	175,877,000	104,797,000	59.6%	20.5%
1969.....	22,139,000	92,993,000	420.0%	20.0%
1970.....	61,630,000	89,115,000	144.6%	19.4%
1971.....	87,505,000	113,062,000	129.2%	17.2%
1972.....	157,426,000	126,444,000	80.3%	15.3%
Total.....	$657,231,000	$608,296,000	92.6%	18.8% (average)

its unitary position or to adjust the NPAs as a result of the protests, petition or information submitted by Shell Oil in response to the Board's requests.[10]

(ii) *Scallop Nuclear.* Prior to 1973, Scallop Nuclear was not in existence. During the relevant period since 1973, Scallop Nuclear filed California franchise tax returns in which Scallop Nuclear itself was the unitary entity for purposes of apportionment of income. In connection with its audit of Scallop Nuclear for the tax years 1973-1976, the Board, on February 16, 1978, made a very extensive demand on Scallop Nuclear for further information, similar to portions of the September 22, 1976, demand on Shell Oil. Most of the information demanded by the Board was not in the possession or control of Scallop Nuclear.

During the years 1973-1976, the General Atomic partnership between Scallop Nuclear and Gulf Oil incurred aggregate book losses of $780,218,000, of which Scallop Nuclear's share was one-half, or $390,109,000. Since Scallop Nuclear had no other business activities, those losses constituted its only "income" in California or elsewhere. Board auditors, however, have informed Scallop Nuclear that it will be treated as part of a unitary business which consists of all Royal Dutch/Shell companies worldwide. The Board proposes to apportion to Scallop Nuclear California income of approximately $46,000,000 for the period 1973-1976. The proposed tax assessments on this figure will be approximately $4,350,111.

THE PROCEEDINGS BELOW

(a) The Complaint.

On November 4, 1981, SPNV filed a complaint in Federal District Court alleging that the Board has violated its rights under the Netherlands FCN Treaty, the United States Constitution and general principles of international law. SPNV

[10] The Board is now preparing to issue NPAs to Shell Oil for the tax years 1973-1976. Those NPAs will be based on an alleged unitary business consisting of all Royal Dutch/Shell companies and may also include a penalty for failure to supply all the information demanded by the Board.

seeks both declaratory and injunctive relief from the alleged violations.[11]

In particular, SPNV alleges that the Board, by combining, apportioning and taxing the worldwide income of SPNV and all its subsidiaries and affiliates, has violated the Netherlands FCN Treaty by (1) denying "fair and equitable treatment" to SPNV and its "property, enterprises and other interests" (Art. I, ¶ 1); (2) taking "unreasonable or discriminatory measures that would impair the rights or interests" of SPNV in its "capital" and in its "enterprises and the property thereof" (Art. VI, ¶ 3); (3) imposing a tax upon income "in excess of that reasonably allocable or apportionable" to California (Art. XI, ¶ 4); (4) denying most-favored-nation treatment (Art. XI, ¶ 3) to SPNV by treating SPNV and its subsidiaries and affiliates in a manner violative of other FCN treaties[12] and (5) denying national treatment (Art. XI, ¶ 1) to SPNV by treating SPNV in a manner violative of the Constitution and according treatment to the United States subsidiaries of SPNV which is less favorable than that accorded certain unrelated United States corporations.

SPNV also challenges the Board's informational demands as an extraterritorial exercise of inquisitorial powers, in violation of SPNV's rights under the Netherlands FCN Treaty and international law.

SPNV alleges that the Board has violated the Foreign Commerce Clause by interfering with the Federal Government's ability to speak with one voice, through its network of treaties, in foreign affairs and by imposing a burden of multiple taxation on foreign commerce. Such burden, as well the underlying combination and apportionment of the income of a local subsidiary with that of its foreign parent company, is also violative of international law. Finally, SPNV claims that the

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[11] The District Court's jurisdiction was properly invoked pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343 (the Civil Rights Act of 1871), 28 U.S.C. § 1331 (the general Federal question statute), 28 U.S.C. § 1332 (the jurisdictional grant for diversity of citizenship), and under principles of pendent and ancillary jurisdiction.

[12] See, for example, Article IX, ¶ 4, of the Convention of Establishment between the United States of America and France, quoted in note 22 *infra*.

Board has violated the Due Process Clause by seeking to tax income with no nexus to California and by seeking to tax income out of all proportion to the activities of Shell Oil and Scallop Nuclear in California.

(b) Decision of the District Court.

SPNV moved for summary judgment, and the Board moved to dismiss the complaint. After briefing and argument, the District Court granted the Board's motion to dismiss the complaint.[13] The District Court first held that SPNV does not have standing to raise its claims. The District Court found that SPNV had satisfied the "injury in fact" requirement of Article III of the Constitution. App. at 16a. The Court concluded, however, that SPNV could not meet the "prudential" requirements that the would-be plaintiff assert its own legal rights and interests and be within the "zone of interests" protected by the legal provision it seeks to invoke. App. at 19a-20a. Specifically, the District Court held that SPNV could not assert its constitutional challenges to the taxation because it was merely a shareholder of the corporations to which the informational demands and NPAs were addressed. As to SPNV's treaty-based claims, the Court held that SPNV was not within the zone of interests protected by the Netherlands FCN Treaty. Unwilling to "strain to read into the Treaty an implied right . . . [in SPNV] not shared by other U.S. corporations", the Court concluded that SPNV could not claim any rights under the Treaty because only "a company of the Netherlands which itself transacts business in the United States falls within the zone of interests sought to be protected by the [Netherlands FCN] Treaty". App. at 19a.

The District Court also held that SPNV's claims were not ripe. The claims relating to the taxation of Scallop Nuclear were not ripe, according to the Court, because NPAs had not been issued to that company. Notwithstanding the issuance of

[13] The District Court rejected the Board's contention that 28 U.S.C. § 1341 barred the action. It held that SPNV could not participate in the state tax proceedings since it is not the nominal taxpayer and therefore did not have a plain, speedy and efficient state remedy. App. at 14a. *See Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1118-19 (9th Cir.), *cert. denied*, 455 U.S. 943 (1982).

NPAs to Shell Oil, the Court also held unripe SPNV's claims relating to that company because "the [franchise tax] statute has not been fully applied" to Shell Oil. App. at 22a.

(c) Decision of the Court of Appeals.

The Court of Appeals for the Ninth Circuit affirmed. On the standing issue, that Court interpreted the Netherlands FCN Treaty as merely providing Netherlands companies with the right to conduct business in the United States on an equal basis with United States corporations. Because a domestic corporation holding a majority interest in Shell Oil or Scallop Nuclear would not, in that Court's view, have standing to challenge the taxation, it held that SPNV could not do so either. App. at 4a-5a. The Court of Appeals implicitly rejected SPNV's standing to raise its constitutional challenges to the Board's action by affirming the District Court without addressing the issue. On the ripeness issue, the Court of Appeals held that although the Tax Injunction Act was inapplicable to SPNV's claims, the principles underlying that Act required a finding that SPNV's claims were not ripe because "Shell [Oil] and Scallop [Nuclear] have plain, speedy, and efficient administrative and state court remedies". App. at 6a.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Underlying Issues in This Case Are of International Importance. The underlying unitary tax issues involved in this case are regarded as highly important by a substantial number of the major trading partners of the United States. Many of the closest allies of the United States, either individually or collectively, have repeatedly issued notes expressing concern, filed *amicus curiae* briefs in various proceedings or suggested the possibility of reprisals, all without avail. This case clearly presents the question whether a state, such as California, has the legal power under the Constitution, the FCN treaties and international law to impose unitary taxation on a combined worldwide basis on United States subsidiaries of foreign parent companies.[14] The determination of that question, however, will

[14] Other cases now before the Federal courts also involved the Foreign Commerce Clause question. *See Alcan Aluminum Ltd. v. Franchise Tax Board,* No. 83-7236, slip op. (2d Cir. June 17, 1983);

be deferred into the remote future, and possibly prevented altogether, if the decision of the court below is allowed to stand.

This Case Brings into Question Limits of State Unitary Taxation Not Resolved in Container. In this case SPNV seeks to present to the Federal courts two important issues with respect to the legally permissible limits of state unitary taxation which were not resolved in *Container*. The first issue involves the question, which was specifically reserved in *Container*, whether the "upstream" unitary taxation of the income of a foreign parent company on the basis of the operations of its United States subsidiaries violates the rights of the foreign parent under the Foreign Commerce Clause.[15] The second issue, which was not even considered in *Container*, is whether such "upstream" unitary taxation of a foreign parent company's income violates the rights of the foreign parent under an FCN treaty that specifically protects it.

This Case Brings into Question the Enforceability of the Whole Body of FCN Treaties. The rationale employed by the

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EMI Ltd. v. Bennett, 560 F. Supp. 134 (N.D. Cal.), *cert. denied*, 103 S. Ct. 570 (1982), *appeal docketed*, No. 82-4611 (9th Cir. Oct. 19, 1982). The present case, however, involves the additional question regarding the effect of the Netherlands FCN Treaty. That question is not present in the cases cited above because neither Canada, the home country of Alcan, nor the United Kingdom, the home country of EMI, has an FCN treaty with the United States.

[15] 103 S. Ct. at 2952 n.26 & 2956 n.32. *Container* involved the "downstream" unitary taxation of a United States parent corporation which had foreign subsidiaries. There is a significant distinction between the "downstream" and "upstream" cases of unitary taxation. In the former case, the taxpayer is a United States parent company which has an economic interest in the income of its foreign subsidiaries. In the latter case, the taxpayer is a United States subsidiary that does not have even an indirect interest in the income of its foreign parent company or of the foreign subsidiaries of such parent company. Thus, by taxing "upstream", the state includes in the apportionment base of the United States subsidiary income of the foreign parent and its foreign subsidiaries which the United States subsidiary never can receive, which it has no power to repatriate and in which it has no economic interest. That distinction between the "upstream" and "downstream" cases aggravates the inequitable treatment in the "upstream" case and greatly enhances the international ramifications in that case.

court below to avoid dealing with those issues has created a new issue of international importance. Under the guise of determinations of standing and ripeness, that court has effectively eviscerated SPNV's substantive protections under the Netherlands FCN Treaty and has threatened to undermine the entire complex of FCN treaties into which this nation has entered. The decision below thus raises the important Federal question whether the entire body of FCN treaties can be enforced in the Federal courts. The lack of resolution of that question threatens to impair adversely the foreign relations of this nation.

I. The Decision of the Court Below Prevents SPNV from Raising Its Claims in Any United States Forum and Deprives the Netherlands FCN Treaty of Substantive Content.

The Court of Appeals held that SPNV did not have standing to raise its treaty-based claims because it was not within the zone of interests to be protected by the Netherlands FCN Treaty. The Court of Appeals' standing decision is based exclusively upon its determination that the Netherlands FCN Treaty provides solely for national treatment—*i.e.*, that companies of The Netherlands are entitled only to those rights that would be available in the United States to United States corporations in the same position. This radical restriction of the scope of the Netherlands FCN Treaty is unsupportable, for it ignores the plain language of the Treaty, as well as its history and purpose. Unless reversed, the judgment of the Court of Appeals threatens to eviscerate the Netherlands FCN Treaty, as well as all other FCN treaties.

(a) The Netherlands FCN Treaty Provides Specific Protections for Companies of The Netherlands.

While the Netherlands FCN Treaty does indeed provide for national treatment, it also explicitly creates certain specific substantive protections that go far beyond such treatment and vest absolute rights in companies of The Netherlands operating in the United States and companies of the United States operating in The Netherlands. For instance, the Treaty:

> (i) requires that "fair and equitable treatment [be accorded] to the nationals and companies of [The Nether-

lands], and to their property, enterprises and other interests" (Art. I, ¶ 1);

(ii) prohibits "unreasonable or discriminatory measures that would impair the rights or interests . . . of nationals and companies of [The Netherlands], whether in their capital, or in their enterprises and the property thereof . . ." (Art. VI, ¶ 3); and

(iii) prohibits the imposition or application of any tax upon income "in excess of that reasonably allocable or apportionable" to the taxing jurisdiction "[i]n the case of companies of [The Netherlands]" (Art. XI, ¶ 4).

Unless the main body of the Treaty is to be ignored, as it manifestly should not be, the Court of Appeals' holding makes no sense. Indeed, it flies in the face of the plain language of the Treaty and contravenes the well established rule that treaties are to be liberally construed. *See, e.g., Kolovrat v. Oregon*, 366 U.S. 187, 193, 194 (1961); *Geofroy v. Riggs*, 133 U.S. 258, 271-72 (1890).

Apparently, the Court below lost sight of the crucial fact that a treaty is an international agreement between two sovereign nations that may well grant on a reciprocal basis absolute rights or privileges to nationals of the other party, whether or not such rights are available to domestic persons.[16] *E.g., Cook v. United States*, 288 U.S. 102 (1933); *Edye v. Robertson*, 112 U.S. 580 (1884); Restatement (Second) of the Foreign Relations Law of the United States § 140 (1965). The Court ignored the fact that the many FCN treaties were entered into (primarily at the behest of the United States) for the express purpose of granting certain absolute substantive protections to foreign business investments, irrespective of the protections

[16] In support of its holding, the Court of Appeals relied upon dictum in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), relating to national treatment that has no bearing on the questions presented in this case. The sole issue in *Sumitomo Shoji* was whether an American subsidiary of a Japanese parent company was a "company of Japan" for purposes of the Japanese FCN Treaty. *Id.* at 189. In contrast, this case presents the issue whether a company of The Netherlands can rely on provisions in the Netherlands FCN Treaty that seek to provide companies of the Netherlands with certain absolute protections.

afforded by the domestic laws of the treaty parties. For example, they were specifically intended to ensure that a United States investment in a foreign nation would not be subject to confiscation without compensation even if nationals of that foreign nation could be so treated.[17] To say that a company whose investments are protected by an FCN treaty is subject to whatever treatment is meted out to local companies utterly misconceives the entire purpose of the protections conferred by the modern FCN treaties.

Indeed, Article XI, ¶ 4 of the Netherlands FCN Treaty (which, of the Treaty articles relevant to this case, is the one specifically addressing taxation) is a compelling example of a Treaty provision that provides an absolute standard of protection for companies such as SPNV. That Article prohibits United States governmental authorities, including respondents, from imposing any tax upon income "in excess of that *reasonably allocable or apportionable* to [the] territories [of the taxing authority]" (emphasis supplied).[18] This language is based upon an international consensus requiring that local subsidiaries be taxed only on the basis of their separate accounts, adjusted as necessary to account for any transactions between related enterprises that were not on an arm's-length basis. That principle of international law was developed to protect foreign companies against attempts by local taxing authorities to

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[17] *See, e.g., Hearing on Treaties of Friendship, Commerce and Navigation Between the United States and Colombia, Israel, Ethiopia, Italy, Denmark, and Greece Before the Subcomm. on Commercial Treaty and Consular Conventions of the Senate Comm. on Foreign Relations*, 82d Cong., 2d Sess. 5, 8 (1952) (statement of Harold F. Linder, Dep. Ass't Sec'y of State for Economic Affairs) (purpose of FCN treaties is to protect from inequitable extraterritorial taxation United States corporations that operate through foreign-incorporated subsidiaries).

[18] Unlike some tax treaties that explicitly apply only to conduct by the Federal government, most modern commercial treaties such as the Netherlands FCN Treaty are applicable to subnational governmental entities as well as the Federal government. *See, e.g., Nielsen v. Johnson*, 279 U.S. 47, 50-51 (1929). In the District Court, the Board conceded that the Netherlands FCN Treaty would apply to state taxation efforts. *See* Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 19.

overreach by basing their taxes on income not fairly allocable to a local subsidiary or permanent establishment.[19]

The development of modern principles of international law applicable to assertions of national and subnational taxing powers derives from the work of the League of Nations. The position of the League was that foreign companies doing business in the taxing country through a "permanent establishment" could be taxed only on the income "produced in" or "derive[d]" in the territories of the taxing state.[20] To determine what income was "derived" or "produced" within the taxing country, the League proposed reliance on the separate accounts of the permanent establishment, treating each permanent establishment as an enterprise independent of any foreign parent company. Income from transactions between related enterprises was to be determined as if the transactions were between "independent persons dealing at arms' length", and the separate accounts of the permanent establishment could be "rectif[ied]" "when necessary". Protocol, Art. VI, ¶ 1(B) (Mexico Draft; London Draft). The League's draft conventions forbade the consolidation or combination of the foreign parent company with its domestic subsidiary for tax purposes.

The League's position with respect to international limitations on state taxation powers was adopted and continued by a number of international organizations, including those of which the United States is a member.[21] That universally accepted

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[19] Courts have long recognized that international treaties are based upon and informed by prevailing principles of international law. *See Geofroy v. Riggs*, 133 U.S. 258, 271 (1890). Moreover, the series of modern FCN treaties was expressly "based upon the principles of international law and practice as reflected in modern international procedures". *See* S. Exec. Rep. No. 8, 80th Cong., 2d Sess. 1 (1948). Accordingly, interpretation of modern FCN treaties must be made in the context of the established international law and practice on which they are based.

[20] *See Model Bilateral Convention for the Prevention of the Double Taxation of Income and Property*, Art. IV, ¶ 3; Protocol, Art. VI, ¶ 1(A) (Mexico Draft 1943; London Draft 1946), League of Nations Document No. C.88.M.88.1946.II.A.

[21] *See, e.g.*, Committee on Fiscal Affairs of the Organization for Economic Cooperation and Development, *Model Double Taxation*

principle was the backdrop for, and gives precise content to, the "reasonably allocable" language of Article XI, ¶ 4 of the Netherlands FCN Treaty.[22]

By limiting the protection of the Netherlands FCN Treaty to the relative protection of national treatment, the lower court has ignored the text and history of Article XI, ¶ 4 and has destroyed all the absolute protections specifically provided by the Treaty. If the lower court's decision is allowed to stand, it will have deprived companies of The Netherlands of the protections envisioned by the draftsmen of the Treaty as necessary to foster free trade between this nation and The Netherlands by reading out of the Treaty all explicit provisions save the one on national treatment. And, reciprocally, the decision will thereby have deprived United States corporations operating in The Netherlands and in other countries with which

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Convention on Income and on Capital, Fed. Taxes: Tax Treaties (P-H) ¶ 1017 at Art. VII, ¶ 1 (1977); United Nations, *Model Double Taxation Convention Between Developed and Developing Countries* ST/ESA/102 (1980) (validity of arm's-length principle of taxation recognized and adopted). *See also Container Corporation of America v. Franchise Tax Board*, 103 S. Ct. at 2952 (majority opinion) & 2957-58 (dissenting opinion).

[22] The Convention of Establishment between the United States of America and France, entered into force December 21, 1960, 11 U.S.T. 2923, T.I.A.S. No. 4625, is substantially similar to the Netherlands FCN Treaty and specifically adopts the arm's-length method as the only proper measure of taxation:

> "The nationals, companies and associations of either High Contracting Party [that are engaged in trade or other gainful pursuit within the territories of the other High Contracting Party, whether or not through a permanent establishment or a fixed place of business] shall not be subject, within the territories of the other High Contracting Party, to any form of taxation upon capital, income, profits or any other basis, except by reason of the property which they possess within those territories, the income and profits derived from sources therein, the business in which they are there engaged, the transactions which they accomplish there, or any other basis of taxation directly related to their activities within those territories."

Art. IX, ¶ 4. By reason of the unconditional most-favored-nation clause of the Netherlands FCN Treaty's taxation article, Art. XI, ¶ 3, SPNV is entitled to the protections of that Convention with France.

the United States has FCN treaties of those same substantive protections.

(b) SPNV Seeks to Assert Rights Accorded It by the Netherlands FCN Treaty.

Had the Court of Appeals applied traditional standing analysis, there would be no question that SPNV has standing to raise its treaty-based claims in Federal court. For a plaintiff to have standing to bring an action, it must allege that it "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant", *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and the injury must be one "likely to be redressed by a favorable decision" by the court, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). Additionally, the plaintiff must meet certain prudential requirements, the most relevant of which is the requirement that the plaintiff's complaint "arguably" fall within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question". *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). *See also Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982).

In the present case, the courts below properly held that SPNV's allegations satisfy the "injury in fact" requirement for standing. The Board's application of its unitary tax system to Shell Oil and Scallop Nuclear on a worldwide basis economically injures SPNV, for SPNV will have to make capital contributions to fund Scallop Nuclear's tax payments, and SPNV will suffer a diminished return on its investment in Shell Oil if Shell Oil must pay the artificially increased tax. Further, only SPNV can satisfy the Board's informational demands, and unless it does so, it will see coercive penalties visited upon its subsidiaries, which will, in turn, diminish its investments therein. These effects are more than sufficient to satisfy the "injury in fact" requirement for standing. *See, e.g., Bryant v. Yellen*, 447 U.S. 352, 366-68 (1980); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74-75 & n.20 (1978); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977).

It is equally clear that SPNV "arguably" falls within the "zone of interests to be protected" by the Netherlands FCN Treaty. The fundamental purpose of that Treaty was to accord certain defined protections to companies such as SPNV. For example, the Treaty: (1) requires that Netherlands companies be treated fairly and equitably, with respect "to their property, enterprises and other interests", Art. I, ¶ 1; (2) prohibits "unreasonable or discriminatory measures that would impair the rights or interests . . . of nationals and companies of [The Netherlands], whether in their capital, or in their enterprises and the property thereof . . .", Art. VI, ¶ 3; and (3) prohibits the imposition or application of any tax upon income in excess of that reasonably allocable or apportionable to the taxing jurisdiction "[i]n the case of companies and of non-resident nationals of [The Netherlands]", Art. XI, ¶ 4. The areas to which such protections are to apply are indicated in Article VII of the Netherlands FCN Treaty, which defines the ways in which Netherlands companies may engage in trade or other gainful pursuit in the United States pursuant to the Treaty. It extends the Treaty's protections to "companies of either Party . . . engaging in all types of commercial, industrial, financial and other activity for gain (business activities) within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity".[23]

In light of the plain language of the Treaty, an argument that SPNV is not "arguably" within the zone of interests protected by the Netherlands FCN Treaty is untenable. SPNV is a company of The Netherlands, and it holds significant interests in its enterprises Shell Oil and Scallop Nuclear. SPNV has alleged that the Board has infringed SPNV's rights under the Netherlands FCN Treaty by not according "fair and equitable treatment" to SPNV and its enterprises, by unreasonably impairing SPNV's interests in its enterprises Shell Oil and Scallop Nuclear through its taxation assertions and informa-

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[23] That same provision also grants companies of The Netherlands rights to engage in trade in the United States "either directly or indirectly through one or more intermediaries, to organize companies under the general company laws of [the United States] and to acquire the controlling interests in companies of [the United States]".

tional demands and by imposing its franchise tax on SPNV's income beyond that reasonably allocable to California.[24]

The assumption by the Court of Appeals that SPNV is challenging conduct that injures only its subsidiaries Shell Oil and Scallop Nuclear is clearly wrong. The very action of California in seeking to base its tax on the combined income of all the Royal Dutch/Shell companies on a unitary basis belies the contention. California is seeking to reach "upstream" to the non-United States income of SPNV and its affiliates. Shell Oil and Scallop Nuclear are mere hooks on which the Board hangs its endeavors to reach SPNV's income from foreign sources. The Board has included in the combination, apportionment and taxation process the income of SPNV, as well as the income of its subsidiaries and affiliates. None of that "upstream" income accrues to or is economically owned by either Shell Oil or

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[24] The District Court's view that the Netherlands FCN Treaty applies only to situations where a foreign parent company "itself transacts business in the United States" through unincorporated local branches, rather than having locally incorporated subsidiaries, is similarly flawed. The Treaty protects "companies of either Party [operating] within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity". Art. VII, ¶ 1. The District Court's opinion is not only inconsistent with the plain language of the Treaty, but since most foreign direct investment is through locally incorporated subsidiaries, it would remove from the Treaty's protections most of the investment activity the two Governments sought to protect.

Furthermore, the District Court's reliance on the fact that SPNV can be characterized as a shareholder of its subsidiaries as a basis for denying standing in this case is misplaced. As this Court has recognized, there are situations in which a shareholder can sue individually to redress injury to the corporation when the shareholder also suffers an injury unique to itself. *See American Power & Light Co. v. S.E.C.*, 325 U.S. 385, 389-91 (1945). *See also Harmsen v. Smith*, 542 F.2d 496, 500-01 (9th Cir. 1976). In this case, SPNV is seeking to remedy injuries that it alone sustains as a result of the Board's actions; no other shareholder of Shell Oil is similarly affected. *See infra* note 26. Additionally, the Netherlands FCN Treaty specifically vests in SPNV the rights it now seeks to invoke, so there can be no question about its standing to sue, regardless of its status as a shareholder of Shell Oil and Scallop Nuclear.

Scallop Nuclear, the nominal taxpayers.[25] In effect, the Board seeks to tax hundreds of millions of dollars of income of the Royal Dutch/Shell companies—more than the total income collectively earned by Shell Oil and Scallop Nuclear for that period. The asserted tax liabilities, if upheld, would result in substantial double taxation of the income of hundreds of Royal Dutch/Shell companies and would reduce the consolidated net worth of the Royal Dutch/Shell companies, as reported in the published financial statements, by tens of millions of dollars.

It is utterly incongruous for the Board to treat SPNV and its affiliates as unitary for the purpose of taxation and for the provision of information, yet to deny that SPNV has standing to contest the legality of such taxation and the informational demands. Given such unitary treatment, SPNV is merely seeking to remedy injuries sustained directly by it, injuries that are distinct from those suffered by Shell Oil and Scallop Nuclear.

(c) SPNV Seeks to Show that Its Rights Under the Foreign Commerce and Due Process Clauses Have Been Violated.

SPNV has challenged the Board's actions as violative of the Foreign Commerce and Due Process Clauses. The Foreign Commerce Clause is meant to prevent states from interfering with this nation's ability to speak with one voice in matters of foreign commerce. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 450-51 (1979). Of particular concern in this regard is the threat of double taxation of the income of foreign companies, which has the potential for impairing this imperative. *Id.* at 447-48. But, as noted by Justice Powell, "double taxation is inevitable" under California's unitary tax system, as applied in the international context. *Container*, 103 S. Ct. at 2959 (Powell, J., dissenting). And, as the party that sees the income of all its enterprises taxed by the countries where they operate and then again by California, SPNV is the party to feel the direct effects of that double taxation and is the party entitled to raise the claims.[26] Because SPNV feels the direct impact of

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[25] This is in contrast to the "downstream" taxation imposed in *Container*. *Cf.* note 15 *supra*.

[26] The Board's inclusion of the foreign-based income of other Royal Dutch/Shell companies will lead to an outrageous level of

the double taxation, it has standing to raise its constitutional claims directly. Additionally, the Netherlands FCN Treaty requires "national treatment with respect to access to the courts of justice", Art. V, ¶ 1; by placing SPNV on the same footing with a United States parent corporation that suffers this unique injury, the Treaty assures SPNV of standing to raise this claim.

SPNV's Foreign Commerce Clause claim differs significantly from those made in *Container*. First, *Container* dealt with the "downstream" taxation of foreign subsidiaries of a United States corporation. In contrast, this case concerns California's attempts to apply its unitary tax "upstream" to foreign parent companies and their overseas affiliates, an issue expressly left undecided in *Container*. 103 S. Ct. at 2952 n.26 & 2956 n.32. Second, the threat of disproportionate double taxation is very real in this case,[27] but there is no authoritative international tribunal to which SPNV can turn for relief in this situation. *Cf. Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. at 447-48. Third, this case has raised sensitive issues of foreign policy to a far greater degree than in *Container*. The unitary taxation method is an internationally condemned

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taxation of Shell Oil and Scallop Nuclear, which causes substantial due process concerns, but those companies will themselves each be presented with only one tax bill from California. Consequently, it is unclear whether they would be in a position to assert that they had suffered from the double taxation. Similarly, SPNV's overseas affiliates do not feel the incidence of the double taxation because they do not pay the California tax assessment. Aside from its parent companies, only SPNV sees its assets diminished twice because of this taxation and thus uniquely feels the unconstitutional burden. Certainly, no other shareholder of Shell Oil is similarly affected.

[27] The Board's actions, if allowed to stand, would effectively attribute to California for the years 1967-1972 a portion of the worldwide income of the Royal Dutch/Shell companies which represents 92.6% of Shell Oil's own consolidated income for those years. During the same years, only 18.8% of Shell Oil's property, payroll and and sales were in California. *See supra* note 9. This percentage is considerably higher than the 66 to 85% figure that was held unconstitutional in *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123 (1931). It demonstrates the severity of double taxation that would result from the Board's application of the unitary taxation principle "upstream" to reach SPNV and its overseas subsidiaries and affiliates.

method of taxation that the United States has disavowed in its dealings with foreign nations. The Board's efforts to apply that method to reach the income of an "upstream" foreign parent company have provoked extensive diplomatic notes from the governments of the Kingdom of The Netherlands, the United Kingdom, Canada, Japan, and the members of the European Economic Community. App. 54a—89a. Moreover, the governments of The Netherlands and Japan have filed *amicus curiae* briefs supporting SPNV's claims in the lower courts. The Board's actions cast substantial doubt upon the capacity of the United States to adhere to an existing and binding treaty into which it willingly entered.

It should also be recognized that the foreign policy implications of this case transcend the concerns of those major trading partners that have companies with subsidiaries in this country. The Board has sought, through the media of Shell Oil and Scallop Nuclear, to arrogate to California a considerable portion of the income of the Royal Dutch/Shell companies for taxation. If the laws of the United States sustain that action, any country that has subsidiaries of foreign parent companies operating within its borders could be prompted to adopt comparable unitary taxation laws. In the absence of an authoritative international tribunal to which the foreign parent company could turn, such a practice, once started, could well spread and undermine the functioning arm's-length method of international taxation. Such a development would, of course, involve and adversely affect United States parent corporations. But, given the example of California, the United States Government would hardly be in a position to lodge credible protests on their behalf.

(d) SPNV Seeks to Show that the Informational Demands Violate the Rights of SPNV Under the Netherlands FCN Treaty.

The very substantial and onerous demands for information which have been made by the Board cannot be fully responded to by Shell Oil and Scallop Nuclear. They simply do not have that information and the Board has repeatedly been advised of

that fact.[28] The only parties that can furnish that information are SPNV and its sister company, Shell Petroleum Ltd., if indeed they are able to obtain the demanded information from their affiliates.[29] The imposition of huge penalties on Shell Oil is a patent device to coerce SPNV into obtaining the demanded data at tremendous expense and providing it to the Board. Indeed, Shell Oil is being held hostage to coerce SPNV to submit to the Board's demands. As the target of the coercion, SPNV certainly must have standing to object.

(e) If SPNV Does Not Have Standing to Assert Its Rights, It Is Unlikely that Any Party Does.

Even if the Court of Appeals' decision has not rendered the Netherlands FCN Treaty essentially void, it is highly probable that the net impact of the decision will be to preclude SPNV's treaty claims from ever being raised. Simply put, it is unlikely that any party will be able to raise for judicial consideration in any Federal or state forum SPNV's claims based upon the Netherlands FCN Treaty. This would be true because:

(1) the Court of Appeals has ruled that SPNV has no standing, in the circumstances of this action, to raise rights unquestionably vested in it by the Netherlands FCN Treaty;

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[28] As noted above, Shell Oil has furnished to the Board, to the best of its ability, information available to it relevant to the Board's request.

[29] *See Lonrho Ltd. v. Shell Petroleum Company Ltd.*, 1 W.L.R. 627, 636 (House of Lords 1980):

> "Shell Mocambique's [a U.K. company which was an indirect subsidiary of Shell Petroleum Ltd. and British Petroleum] documents are not in my opinion within the 'power' of either Shell or B.P. within the meaning of [the discovery order]. They could only be brought within their power either (1) by their taking steps to alter the Articles of Association of Consolidated and procuring Consolidated through its own Board of Directors to take steps to alter the Articles of Association of Shell Mocambique, which [the discovery order] does not require them to do; or (2) by obtaining the voluntary consent of the Board of Shell Mocambique to let them take copies of the documents."

(2) SPNV would be unable to raise such treaty claims in state court because SPNV is not the "taxpayer" involved.[30]

(3) the Board would decline to permit either Shell Oil or Scallop Nuclear to raise such treaty claims in the state administrative proceedings on the ground that the Netherlands FCN Treaty vests no rights in United States subsidiaries of Netherlands companies;[31] and

(4) the Board would assert in any state court proceeding that, if SPNV cannot raise its treaty-based claims, Shell Oil and Scallop Nuclear certainly cannot raise them on behalf of SPNV.

The Court of Appeals has applied a peculiar twist to the standing doctrine. That Court's decision either limits the Netherlands FCN Treaty protections to national treatment or it denies SPNV the right to raise its arguments under the Treaty. Either result is wrong and should be remedied.

II. This Case Is Ripe for Adjudication.

(a) The Decision of the Court Below Has Improperly Transformed the Ripeness Doctrine into a Requirement of Vicarious Total Exhaustion of State Remedies by Another Person in Another Proceeding.

The Court of Appeals held that SPNV's treaty-based claims were in any event not ripe for judicial resolution because Shell Oil and Scallop Nuclear have not exhausted *their* state administrative and judicial remedies. Unless this aberrational interpretation of the ripeness doctrine is reversed, SPNV will be forced to endure extended administrative and judicial proceedings in which it will not be able to participate and in which its position that the Board's actions violated SPNV's rights under the Netherlands FCN Treaty, the Constitution and other principles of law will remain unadjudicated. Meanwhile, SPNV will be obliged to comply with oppressive information

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[30] *See Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1118-19 (9th Cir.), *cert. denied*, 455 U.S. 943 (1982).

[31] Transcript of Oral Argument in District Court at 47. *See also Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982).

demands or risk allowing its subsidiaries to suffer enormous multimillion dollar fines because of SPNV's inability to assert its right not to provide the information.

This inequitable result will obtain because the decision of the Court of Appeals has created a requirement of exhaustion of remedies in contravention of this Court's longstanding rule that a plaintiff need not exhaust its state administrative and judicial remedies before bringing suit under 42 U.S.C. § 1983. *See, e.g., Patsy v. Board of Regents*, 457 U.S. 496, 500-01,516 (1982); *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Although the Court of Appeals acknowledged this Court's decision in *Patsy*, it nonetheless held that this case was not ripe because *Shell Oil* and *Scallop Nuclear* "have plain, speedy, and efficient administrative and state court remedies". App. at 6a. Such a holding, however, saps the *Patsy* holding of all effect by conflating the ripeness and exhaustion doctrines. *Patsy's* reaffirmation of the nonexhaustion rule under § 1983 is meaningless if exactly the same requirement can be imposed under the ripeness doctrine instead. That is particularly true where, as here, plaintiff is told to wait for the completion of the administrative and judicial remedies of another person in another proceeding in which the treaty issues directly involving SPNV cannot be asserted. This Court should not countenance the lower court's obvious disregard for the controlling line of authority.

(b) The Tax Injunction Act Is Not Applicable.

The Court of Appeals tried to buttress its opinion by invoking the "policies" of the Tax Injunction Act, 28 U.S.C. § 1341. Neither § 1341 nor its policies support that court's position. Section 1341 provides that the district courts shall not restrain the assessment of state taxes "where a plain, speedy and efficient remedy may be had in the courts of such State". A foreign parent company in the position of SPNV, however, does not have any remedy in the California state courts because it is not deemed to be the taxpayer. Accordingly, § 1341 is inapplicable by its very terms. *Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1118-19 (9th Cir.), *cert. denied*, 455 U.S. 943 (1982). As the Congress stressed when it enacted § 1341, "the bill does not take away any equitable right of the

taxpayer or deprive him of his day in Court". S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937). Even more, it does not deprive a *nontaxpayer* of his day in court. Because § 1341 does not apply to SPNV's direct action, it makes no sense to use its underlying policies as a basis for undermining the *Patsy* line of authority.[32]

The decision below also flies in the face of longstanding authority that a statute should be construed so as to render it compatible with a treaty. *See* Restatement (Second) of the Foreign Relations Law of the United States § 145 comment b & Reporter's note 1 (1965). Since the Netherlands FCN Treaty exists to promote trade between the two countries, and specifically provides for access to United States courts, § 1341 should be read to avoid any frustration of the Treaty's purpose. In this case, the strained application of § 1341 deprives SPNV, and possibly all other parties, of the opportunity to raise the treaty claims in court. Surely such a result is plainly at odds with this rule. Any apparent conflict between the Netherlands FCN Treaty and § 1341 can, of course, be avoided by applying each of them according to their plain terms.[33]

(c) This Case Is Ripe Under Traditional Requirements.

Application of traditional ripeness requirements leads to the conclusion that SPNV's claims are ripe for adjudication. The "basic rationale" of the ripeness doctrine is to prevent courts "from entangling themselves in abstract disagreements over administrative policies". *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). *See also Pacific Gas & Electric Co. v.*

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[32] This Court's opinion in *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981), is not to the contrary. In that case, this Court held that the nonexhaustion rule of § 1983 did not override the Tax Injunction Act and that a taxpayer with plain, speedy and adequate state remedies was barred from bringing a federal action under § 1983. *Id.* at 116. Since SPNV is not the nominal taxpayer and thus has no state remedies available, *McNary* is inapplicable.

[33] Furthermore, to the extent that conflict between § 1341 and the Netherlands FCN Treaty is inevitable, the Treaty provisions, entered into force in 1957, would supersede the provisions of the earlier dated § 1341. *Cook v. United States*, 288 U.S. 102, 118-19 (1933); Restatement (Second) of the Foreign Relations Law of the United States § 141 (1965).

State Energy Resources Conservation & Development Commission, 103 S. Ct. 1713, 1720-22 (1983) (reaffirming *Abbott*). The doctrine is a pragmatic doctrine that focuses on two considerations: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration". 387 U.S. at 149-50. SPNV satisfies both parts of this analysis.

First, the issues raised by SPNV's complaint present purely legal questions. This case concerns the application *in principle* of unitary taxation to a Netherlands parent company and its United States subsidiaries. The basic issues involved on the merits are:

(i) Does unitary taxation as asserted by California violate SPNV's rights under the Netherlands FCN Treaty?

(ii) Does unitary taxation as asserted by California violate SPNV's rights under the Foreign Commerce and Due Process Clauses and international law?

(iii) Does forcing SPNV to comply with burdensome and expensive information demands in order to protect its subsidiaries violate SPNV's rights under the Netherlands FCN Treaty, the Constitution and international law, particularly in the absence of answers to questions (i) and (ii)?

It is extremely doubtful that any administrative action by the Board is going to change in a significant manner those basic issues. The Board has been asserting that the Royal Dutch/Shell companies are a unitary business for the past eight years, both in this litigation and at the administrative level, despite the receipt of voluminous factual submissions from Shell Oil.[34] At this date, it is clear that the Board is not going to

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[34] The factual submissions made by Shell Oil completely answered the questions of the Board insofar as they pertain to the relationship between Shell Oil and any and all Royal Dutch/ Shell companies. Thus, the Board has had all the information needed to make a unitary decision with respect to Shell Oil and certain non-United States Royal Dutch/Shell companies for over five years. It was only with respect to questions pertaining to the relations among the non-United States Royal Dutch/Shell companies that Shell Oil could not fully respond, inasmuch as such information was not available to it, but only to SPNV and its affiliates. *See supra* p.6.

change its mind on the threshhold constitutional and treaty issues involved, and it is apparent that the determinative legal questions involved will not be altered in any way by delay.

Second, the "hardship to the parties of withholding court consideration" is also substantial. The Board has issued NPAs to Shell Oil. These NPAs represent the conclusion of the audit process. Upon receipt of an NPA, a taxpayer must either file an official protest or pay the tax assessment; upon failure to file a protest within 60 days, the sums asserted become due. Thus, the actions of the Board have forced the initiative upon the taxpayer. Moreover, SPNV is threatened with immediate harm because it has been and will continue to be coerced to produce vast quantities of information at great expense. The Board's demands will necessarily have the intended effect of forcing SPNV to comply, notwithstanding SPNV's asserted treaty rights not to do so. The threat of enormous penalties and the risk of preclusion are too great to admit of any other result.

Only now can the threshold legal issues be resolved without forcing SPNV to relinquish its rights and its subsidiaries to undergo further state proceedings which will not address the essential questions presented by SPNV's complaint.

(d) Protests of Foreign Governments.

An independent line of authority also makes it clear that this case is ripe for adjudication. This Court has held that a district court may assert jurisdiction and determine the power of an administrative agency before the agency has completed its proceedings when the controversy "has aroused vigorous protests from foreign governments and created international problems for [the United States] Government." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 16-17 (1963). Those circumstances are present here. As discussed above, the governments of many of this nation's major trading partners have protested the "upstream" extraterritorial application of the unitary tax to reach foreign parents, and both The Netherlands and Japan have actively participated in this litigation in support of SPNV. *See supra* pp. 22-23. It is clear that the continuing diplomatic turmoil provides "compelling justification for prompt judicial resolution of the controversy over the

Board's power". *Id.* at 17. Insofar as other countries are concerned, this case is not only ripe for adjudication; it cries out for it, and in the most expeditious manner possible.[35]

CONCLUSION

For the reasons stated above, this petition should be granted. In that regard, petitioner respectfully suggests that this Court consider requesting the Solicitor General to present the views of the United States.

In light of the present and continuing concerns expressed by various foreign governments with respect to the underlying treaty, constitutional and international law issues in this case, petitioner further respectfully suggests that, if this petition should be granted, this Court consider the desirability of directing the parties to brief such issues.

October 8, 1983

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[35] This controversy can only worsen with the increasing willingness of states to adopt unitary tax systems in the face of international opposition to that method of taxation. For instance, the State of Florida recently enacted a unitary tax law in response to this Court's decision in *Container*. *See* Wall Street Journal, July 19, 1983, at 29, col. 1.

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No.

Office-Supreme Court, U.S.
FILED
OCT 8 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SHELL PETROLEUM N.V.,

Petitioner,

—against—

MICHAEL FRANCHETTI, KENNETH CORY, WILLIAM M. BENNETT, INDIVIDUALLY AND AS MEMBERS OF, AND GERALD H. GOLDBERG, INDIVIDUALLY AND AS EXECUTIVE OFFICER OF, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHELL PETROLEUM, N.V.,

Plaintiff-Appellant,

vs.

MARY ANN GRAVES, KENNETH CORY, ERNEST J. DRONENBURG, JR., individually and as members of, and GERALD H. GOLDBERG, individually and Executive Officer of, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,

Defendants-Appellees.

CA NO. 82-4535
DC NO. CV 81-4302

OPINION

Appeal from the United States District Court
for the Northern District of California
Honorable Marilyn H. Patel, District Judge, Presiding
Argued and submitted April 14, 1983

Before: TRASK, SKOPIL, and FERGUSON, Circuit Judges

TRASK, Circuit Judge

Shell Petroleum N.V. (SPNV) appeals the dismissal of its action for declaratory and injunctive relief. Pursuant to 42 U.S.C. § 1983 (1976), SPNV sought to enjoin the California Franchise Tax Board from assessing taxes based on a "unitary" business formula against two companies in which SPNV was the majority stockholder. The district court dismissed SPNV's complaint for lack of standing and because the controversy was not ripe. The decision of the district court is affirmed.

I

SPNV is a Netherlands company. During the years relevant to this action, 1967 to 1976, SPNV held 69 percent of the common stock of Shell Oil, a Delaware corporation. SPNV also owned all the stock of Scallop Holding Inc., a Delaware corporation, which in turn owned all the stock of Scallop Nuclear, also a Delaware corporation. Shell Oil and Scallop Nuclear both conducted business in California during the relevant period.

California's corporate franchise tax is a "unitary" income tax based on the taxpayer's business activities both within and without the state. *See* Cal. Rev. & Tax. Code §§ 25120 to 25140 (West 1979). As a threshold question the Board determines which operations of the taxpayer and related companies are sufficiently integrated in the production of overall corporate income to warrant "unitary" treatment. Ratios based on the taxpayers total property, payroll and sales values in California compared to the same items of the unitary business throughout the world are then calculated. The average of the ratios is then applied to the worldwide net income of the unitary business to determine the taxpayer's income in California for tax purposes.

The Board is in the process of auditing Shell Oil and Scallop Nuclear. The Board has demanded information concerning the worldwide operations of SPNV from Shell and Scallop. SPNV alleged that the Board had made or would make a determination that the California taxpayers were part of a unitary business consisting of all companies worldwide in which SPNV is the majority owner. According to SPNV, such a determination will produce a gross disproportion between the income attributed to the California activities of Shell and Scallop and the income actually earned.

II

STANDING

Although SPNV has thoroughly briefed the Constitutional aspects of standing, the district court's decision in this case was based on prudential rather than Constitutional grounds. SPNV is a shareholder in both Shell and Scallop. Generally, a shareholder does not have standing to redress an injury to the corporation. *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 439-40 (9th Cir. 1979) (sole shareholder had no standing to assert either federal or state law claims); *Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 846 (9th Cir. 1976) (majority shareholder may not assert state law claims despite economic injury to him); *Erlich v. Glasner*, 418 F.2d 226 (9th Cir. 1969) (sole shareholder could not maintain an action under 42 U.S.C. § 1983).

To have standing to maintain an action, a shareholder must assert more than personal economic injury resulting from a wrong to the corporation. *Von Brimer v. Whirlpool*, 536 F.2d at 846. A shareholder must be injured directly and independently of the corporation. *Id.; Erlich v. Glasner*, 418 F.2d at 228. The method of taxation that SPNV seeks to enjoin does not injure SPNV directly or independently of the corporation.

SPNV alleges that it has standing through the Treaty of Friendship, Commerce and Navigation, March 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942 (Treaty). A cause of action may be specifically granted to a shareholder distinct from the corporation by such a provision. *E.g., Harmsen v. Smith*, 542 F.2d 496, 499-500 (9th Cir. 1976). The Treaty provisions relied upon by SPNV do not explicitly give it rights which a domestic shareholder would not have.[1]

---

1. The portions of the Treaty which SPNV contends give rise to its claims are Article I(1), Article VI(3), and Article XI(1), (3), and (4). These Articles read as follows:

Article I(1):

> Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and their property, enterprises and other interests.

The Supreme Court recently interpreted the Friendship, Commerce and Navigation treaty between the United States and Japan. *Sumitomo Shoji America, Inc. v. Avagliano,* ..... U.S. ....., 102 S.Ct. 2374 (1982). The Court stated:

> The Friendship, Commerce and Navigation Treaty between Japan and the United States is but one of a series

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Article VI(3):

Neither Party shall take unreasonable or discriminatory measures that would impair the rights or interests within its territories of nationals and companies of the other Party, whether in their capital, or in their enterprises and the property thereof, or in the skills, arts or technology with which they have supplied.

Article XI(1):

Nationals or either Party residing within the territories of the other Party, and nationals and companies of either Party engaged in trade or other gainful pursuit or in scientific, educational, religious or philanthropic activities within the territories of the other Partys, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, within the territories of such other Party, more burdensome than those borne by nationals and companies of such other Party.

Article XI(3):

Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities of any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third country.

Article XI(4):

In the case of companies and of nonresident nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other bases in excess of that reasonably allocable or apportionable to its territories, nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories. A comparable rule shall apply also in the case of companies organized and operated exclusively for scientific, educational, religious or philanthropic purposes.

> of similar commercial agreements negotiated after World War II. The primary purpose of the corporation provisions of the Treaties was to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms. . . . The purpose of the treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage.

102 S.Ct. at 2380-81.

A domestic corporation holding a majority interest in Shell or Scallop would not have standing in this case as the injury complained of is not direct or individual. The Treaty places SPNV in the same position as a domestic corporation: it has no standing.

III

RIPENESS

As an alternative ground for its decision, the district court held the controversy was not ripe as it was still at the administrative stage. The district court stated:

> The present posture of this case at the administrative level, according to SPNV, is as follows. SPNV represents that the Board has demanded information of Scallop Nuclear, but that no notice of proposed assessment has yet been issued to Scallop Nuclear. Auditors for the Board have prepared a report proposing that the Board issue such a notice for tax years 1973-76, but the Board has not acted on this proposal. The Board had demanded information of Shell Oil, and issued to Shell Oil notices of proposed assessments for tax years 1967-72. These notices propose assessments of additional taxes, as well as penalties for failure to provide requested information. Shell Oil has formally protested the proposed assessments and has petitioned the Board pursuant to Cal. Rev. & Tax. Code

> § 25137, requesting that the "unitary business enterprise" for purposes of Shell Oil's tax be reduced in scope to include only Shell Oil and its subsidiaries. The Board has not acted on its protest or petition. The Board is "preparing to issue" to Shell Oil notices of proposed assessments for tax years 1973-76; and these proposed assessments "may" also include proposed penalties for failure to supply requested information.

Shell Petroleum N.V. v. Graves, No. C-81-4307, slip op. at 13-14 (N.D. Cal. Aug. 9, 1982). Both Shell and Scallop are in early phases of the administrative proceedings. Once a taxpayer protests an assessment, it is still entitled to a hearing before the Board and an appeal lies to the State Board of Equalization. *See* Cal. Rev. & Tax. Code §§ 25665-25667 (West 1979). SPNV argues that the controversy is ripe because the information being demanded of the taxpayers must come from SPNV. The district court did not consider this a sufficient injury to enjoin.

Although there is not an administrative exhaustion requirement for 1983 claims, *Patsy v. Board of Regents*, ... U.S. ....., 102 S.Ct. 2557 (1982), the district court based its decision on the policy underlying the Tax Injunction Act. 28 U.S.C. § 1341. This court has stated:

> Section 1341 provides that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such State." This statute has its roots in equity practice, the principles of federalism and in recognition of the need of a state to administer its own fiscal operations. This Court has held that Section 1341 also generally bars action for declaratory relief against the assessment or collection of state taxes.

Capitol Industries-EMI, Inc. v. Bennett, 681 F.2d 1107, 1112 (9th Cir. 1982), ... U.S. ....., *cert. denied* 103 S.Ct. 579 (1983) (citations omitted) Shell and Scallop have plain, speedy, and efficient administrative and state court remedies. The controversy can not yet be considered ripe.

CONCLUSION

SPNV would not have standing to challenge the tax board if it was a domestic corporation. The Treaty appears to do no more than assure that SPNV is on equal footing with domestic corporations. There is equal footing in this case. Furthermore, the policies underlying the Tax Injunction Act compel us to determine that this controversy is not ripe. Therefore, the decision of the district court is affirmed.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SHELL PETROLEUM, N.V.,
Plaintiff,

vs.

MARY ANN GRAVES, KENNETH CORY, ERNEST J. DRONENBURG, JR., individually and as members of, and GERALD H. GOLDBERG, individually and as Executive Officer of, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,
Defendants.

No. C-81-4302-MHP
MEMORANDUM DECISION AND ORDER

I. INTRODUCTION

Plaintiff Shell Petroleum, N.V. (hereinafter "SPNV") is, by its own account, an incorporated Netherlands holding company with its principal place of business in The Hague, The Netherlands. It is not qualified to do business in the United States; and it neither does business nor has any permanent establishment in the United States.

SPNV owns approximately 69% of the outstanding shares of the common stock of Shell Oil Company (hereinafter "Shell Oil"), which is incorporated in Delaware and headquartered in Houston, Texas. The remaining common stock of Shell Oil is held by a large number of shareholders; the stock is listed for trading on the New York Stock Exchange and other stock exchanges in the United States and Canada. Shell Oil does business in California and throughout the United States, as well as in several foreign countries.

SPNV also owns 100% of the shares of Scallop Holding Incorporated, a Delaware corporation with its principal place of

business in the State of New York. Scallop Holding Incorporated in turn holds 100% of the stock of Scallop Nuclear, Inc. (hereinafter "Scallop Nuclear"), which is also a Delaware corporation with offices in New York. Scallop Nuclear, like Shell Oil, does business in California. Neither Scallop Nuclear nor Shell Oil are parties to this action.

Sixty percent of the equity shareholdings of plaintiff SPNV are held by Royal Dutch Petroleum Company (hereinafter "Royal Dutch"), which is incorporated in The Netherlands, and the other 40% is held by the Shell Transport and Trading Company, Public Limited Company (hereinafter "Shell Transport"), which is incorporated in England. Royal Dutch and Shell Transport also hold, directly or indirectly, entire or majority interests in over 900 companies located in more than 100 countries around the world. These companies are principally engaged in producing and marketing chemicals and nonferrous metals, in mining and marketing coal, and in the exploration, production, refining, and marketing of oil and gas.

SPNV has filed this action for declaratory and injunctive relief against the Executive Officer and members of the Franchise Tax Board (hereinafter "the Board"). SPNV alleges that the Board has assessed or plans to assess Shell Oil and Scallop Nuclear for additional corporate income tax payments it maintains are owing for tax years 1967-76, under the provisions of the California Bank and Corporation Tax Law, Cal. Rev. & Tax. Code §§ 23001 et seq.

Sections 25101 and 25120-25140 of that Code provide a formulary method for apportioning income derived from a taxpayer's business activities both within and without California. Simply stated, the statutory formula requires that three fractions be calculated: (1) the ratio of the value of all real and tangible personal property of the taxpayer in California to its worldwide real and tangible personal property; (2) the ratio of the California payroll of the taxpayer to its worldwide payroll; and (3) the ratio of the value of the California sales of the taxpayer to the value of its worldwide sales. These three

fractions are then, in effect, averaged, and the resulting fraction is then multiplied by the taxpayer's total income to find the portion of that income attributable to California for state corporate franchise tax purposes. One obvious purpose of this formulary apportionment method is to frustrate the shifting of income to the taxpayer's subsidiaries or unincorporated branches in nations or states with more hospitable tax laws, by means of fraudulent intracorporate or intercorporate transactions which, at least on paper, reduce the incomes of the California subsidiaries or branches while inflating those of out-of-state subsidiaries or branches.

SPNV alleges that the Board has made or will make a determination that Shell Oil and Scallop Nuclear, the California taxpayers here, are in fact part of a single unitary business enterprise consisting of all the many worldwide companies that are more than 50% owned, directly or indirectly, by Royal Dutch or Shell Transport, irrespective of where these many companies do business. On the basis of that determination, SPNV alleges, the Board has combined or plans to combine the income of all of these companies, arriving at the fraction of that aggregate income which it considers to be attributable to the California business activities of Shell Oil and Scallop Nuclear by means of the statutory formula. SPNV alleges that the Board's application of the formula to the worldwide income of the Royal Dutch/Shell Transport companies produces a gross disproportion between the income so attributed to California activities and the income actually earned by Shell Oil and Scallop Nuclear.

SPNV contends that the California apportionment method, both facially and as applied by the Board in this case, is repugnant to the commerce clause, article I, section 8, clause 3; the due process clause, amendment XIV, section 1; and the treaty clause, article II, section 2, clause 2, of the Constitution of the United States. It also contends that the method applied by the Board violates the Treaty of Friendship, Commerce and Navigation, March 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942 (hereinafter "the Treaty of

1956"), and the Convention Between the United States of America and the Kingdom of the Netherlands with Respect to Taxes on Income and Certain Other Taxes, April 29, 1948, 62 Stat. 1757, T.I.A.S. No. 1855, as amended by a Supplementary Convention, December 30, 1965, 17 U.S.T. 896, T.I.A.S. No. 6051 (hereinafter "the Double Taxation Convention"). In addition, SPNV contends that the method applied by the Board violates "general principles of international law."

SPNV also complains of allegedly burdensome and unlawful demands for information made by the Board upon both Shell Oil and Scallop Nuclear. SPNV alleges that the Board has demanded of the taxpayers information, much of which is not in their possession, concerning the history, structure, business, revenues, and income of the more than 900 companies controlled by Royal Dutch or Shell Transport, along with an account of past crude oil transactions between Royal Dutch/Shell Transport companies. For its failure to produce information demanded by the Board, SPNV alleges, Shell Oil has been notified of a proposed penalty assessment by the Board. SPNV, contending that these demands for information are tantamount to an unlawful assertion of jurisdiction over SPNV, seeks an injunction preventing the defendants from pressing them.

SPNV has moved for summary judgment, and the defendants have moved to dismiss the action. The court grants the motion to dismiss because SPNV does not have standing to raise its claims, and because the controversy is not ripe for decision.

II. STANDING

SPNV does not, according to its complaint, conduct business operations within the United States, and it is not a California taxpayer. The Board is not alleged to have assessed or exacted taxes or demanded information directly from SPNV. Rather, taxpayers Shell Oil and Scallop Nuclear, which do transact business in California, are the entities of whom infor-

mation has allegedly been directly demanded, and against whom the proposed assessments will allegedly be made.

Shell Oil and Scallop Nuclear have not joined in this action; nor could they have done so, as the Tax Injunction Act, 28 U.S.C. §1341, withholds from the district courts jurisdiction to entertain actions for injunctive or declaratory relief from the assessment, levy, or collection of any state tax if the plaintiff has a "plain, speedy and efficient remedy" in state court. Where a United States subsidiary corporation is aggrieved by an allegedly unlawful income tax assessment by the California Franchise Tax Board, which assessment is based on the application of the formula apportionment method to the Board's determination that the subsidiary, its foreign parent, and other subsidiaries of the parent are engaged in a unitary business, the taxpayer subsidiary has a plain, speedy, and efficient remedy in state court and is therefore precluded from seeking declaratory[1] or injunctive relief in federal district court. *Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107 (9th Cir. 1982), *cert. denied*, 455 U.S. 943 (1982).[2]

While the Tax Injunction Act is not directly at issue in this action, its salutary purposes should be kept in mind. The "principal motivating force behind the Act" was a congressional desire "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522 (1981). *See also California v. Grace Brethren Church*, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982). The Act was designed to

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[1] In *California* v. *Grace Brethren Church*, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982), the Supreme Court held that the Tax Injunction Act prohibits district courts from granting declaratory relief as well as injunctive relief.

[2] *Capital Industries-EMI* v. *Bennett*, like the case *sub judice*, involved a constitutional challenge to unitary treatment, and as in the instant case the plaintiff sought relief from the Board's demands upon the taxpayer subsidiary for business records of the foreign parent and of the parent's other subsidiaries. But it did not, apparently, involve a challenge based on a treaty or on international law.

effectuate this policy notwithstanding the fact that the states may require that the taxpayer subject itself to the state's exactions as a precondition of a state court challenge to the lawfulness of those exactions. *See California v. Grace Brethren Church,* 102 S.Ct. at 2512-13; *Rosewell v. LaSalle National Bank,* 450 U.S. at 523-24. Section 1341 reflects "the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism', particularly in the area of state taxation"—an independent principle that was relied on by the federal courts in refusing to grant equitable relief from state tax laws both before and after the enactment of the statute. *Fair Assessment in Real Estate Association, Inc. v. McNary,* 454 U.S. 100, 103 (1981).[3]

Another important purpose of the Act was to equalize the remedies available to taxpayer corporations that were citizens of the state imposing the tax, on the one hand, and foreign taxpayer corporations, on the other. Congress feared that absent the Act, a foreign corporation, through diversity, could, at that time, obtain federal-court relief prohibiting the collection of certain state taxes, while the citizen corporation would be required to pay first and then litigate in the state courts. *Fulton Market Cold Storage Co. v. Cullerton,* 582 F.2d 1071, 1074-75 (7th Cir. 1978), *cert. denied,* 439 U.S. 1121 (1979), *disapproved on other grounds, Fair Assessment in Real Estate Association v. McNary, supra; Robinson Protective Alarm Co. v. City of Philadelphia,* 581 F.2d 371, 375 (3d Cir. 1978); *Tramel*

[3] Thus, " 'even where the Tax Injunction Act would not bar federal-court interference in state tax administration, principles of federal equity may nevertheless counsel the withholding of relief.' " *Fair Assessment in Real Estate Association, Inc.* v. *McNary,* 454 U.S. at 107 and n.4 (quoting *Rosewell* v. *LaSalle National Bank,* 450 U.S. 503, 525-26 n.33 (1981)). As the Supreme Court reaffirmed in the *Fair Assessment* and *Rosewell* cases, the Act is not a mandatory withdrawal from federal courts of their traditional power to decline jurisdiction, where equitable relief is sought, in the exercise of their discretion.

v. Schrader, 505 F.2d 1310, 1316 (5th Cir. 1975). *See also Rosewell v. LaSalle National Bank*, 450 U.S. at 522-23 n.29.

In the instant case, the foreign shareholder seeks to circumvent the Tax Injunction Act by a bold and simple technique: bringing its own action.[4] While Shell Oil and Scallop Nuclear have plain, speedy, and efficient administrative and state court remedies in these circumstances, *see Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d at 1113-18, SPNV does not, because it is not the taxpayer, *id.* at 1118. It is therefore not barred by the Tax Injunction Act. *Id.* at 1119.

But although the *Capitol Industries* court remanded the cases before it, holding that the foreign parent, unlike its taxpayer subsidiary, was not barred by the Act, it expressed serious reservations concerning the parent's standing to challenge the proposed assessment against its subsidiary. *Id.* at 1119 n.31. The standing issue, it noted, was not before the court on that appeal. It is before this court in the instant case.

It is clear in this circuit, as it is in others, that the shareholder of a corporation—even a sole shareholder—does not, in general, have standing to redress an injury to the corporation. *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 439-40 (9th Cir. 1979) (creditor and sole shareholder had no standing to assert either federal or state law claims); *Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 846 (9th Cir. 1976) (majority shareholder may not assert state law claims despite economic injury to him); *Erlich v. Glasner*, 418 F.2d 226 (9th Cir. 1969) (shareholder who, with his wife, owned all the stock of injured corporation, could not maintain an action under 42 U.S.C. § 1983 to redress the injury). *Accord, Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981); *Smith v. Martin*, 542 F.2d 688, 690 (6th Cir. 1976), *cert. denied*, 431 U.S. 905 (1977); *Vincel v. White Motor Corp.*, 521 F.2d 1113 (2d Cir. 1975); *Vanderboom v. Sexton*, 460 F.2d 362, 364 (8th Cir.

[4] SPNV, according to the pleadings, is the majority shareholder of Shell Oil, and the sole shareholder of Scallop Nuclear's only shareholder.

1972); *McDaniel v. Painter*, 418 F.2d 545, 547 (10th Cir. 1969).[5]

In the case at bar, the plaintiff must be in a position to assert much more than mere economic injury occasioned by its ownership of a corporation whose rights have been violated. *Von Brimer v. Whirlpool*, 536 F.2d at 846. It must allege that it, rather than the taxpayer subsidiary, has been injured, individually and directly, by independent wrongdoing infringing rights belonging severally to it as a shareholder. *Id.*; *Erlich v. Glasner*, 418 F.2d at 228; *Buschmann v. Professional Men's Association*, 418 F.2d 659 (7th Cir. 1969). A statute or other provision may specifically vest rights and create a right of action in the shareholders as distinct from the corporation, *see Harmsen v. Smith*, 542 F.2d 496, 499-500 (9th Cir. 1976) (section 93 of the National Banking Act); but absent this, injury to the corporaiton is not cognizable as injury to the shareholders, for purposes of the standing requirements.

It does not appear that the constitutional provisions alleged to have been violated by the imposition of this method of taxation or by the Board's alleged informational demands specifically vest rights in, or create any right of action in favor of, the shareholders as shareholders, apart from those of the corporation. *See Erlich v. Glasner* (action under 42 U.S.C. §1983 grounded on alleged deprivation of due process). Nor does SPNV refer the court to any authority suggesting that what it describes as "general principles of international law" or "customary international law" specifically vest such rights in shareholders as such.

SPNV does, however, suggest that it lies "within the zone of interests protected by" the Treaty, and that the Double Taxation Convention vests rights in SPNV as well as in its

[5] Of course, under proper circumstances a shareholder may bring a derivative action *on behalf of* the corporation. *Erlich* v. *Glasner*, 418 F.2d 226, 228 (9th Cir. 1969). But that is not this case.

United States subsidiaries.[6] It further contends that the Treaty and the Double Taxation Convention incorporate the commerce clause and the due process clause of the Consititution into their national treatment guarantees. Only if the Treaty or the Convention specifically create rights of action by a Netherlands shareholder of a U.S. corporation does SPNV have standing to complain of threatened injury to Shell Oil and Scallop Nuclear.

The portions of the Treaty which SPNV contends give rise to its claims are Article I(1), Article VI(3), and Article XI(1), (3), and (4).[7] The question is whether these provisions should

[6] As SPNV contends, its allegations satisfy the "injury in fact" requirement for standing under article III of the federal Constitution. *See Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979). Injury in fact was undoubtedly adequately alleged in most of the cases holding that majority or sole shareholders did not have standing to redress injuries to the corporation. But even where the requirements of article III are satisfied, a plaintiff may still lack standing under "prudential" standing principles. *Id.* at 99-100. Among these principles are that a plaintiff must be asserting " 'his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties,' " *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)), and "that the plaintiff's complaint [must] fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question,' " *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. at 475 (quoting *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153 (1970)). The requirement that a shareholder establish injury to rights specifically vested in it individually, distinct from those of the corporation, is undoubtedly a prudential rather than a constitutional one. It might or might not be a particular instance of the more general prudential standing principles quoted above. But in any event, the requirement must be satisfied.

[7] The text of these provisions is as follows.

Article I(1)

1. Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests.

be understood to vest rights in SPNV. The opinion of the Supreme Court in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), is instructive.

Article VI(3)

3. Neither Party shall take unreasonable or discriminatory measures that would impair the rights or interests within its territories of nationals and companies of the other Party, whether in their capital, or in their enterprises and the property thereof, or in the skills, arts or technology which they have supplied.

Article XI(1)

1. Nationals of either Party residing within the territories of the other Party, and nationals and companies of either Party engaged in trade or other gainful pursuit or in scientific, educational, religious or philanthropic activities within the territories of the other Party, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, within the territories of such other Party, more burdensome than those borne by nationals and companies of such other Party.

Article XI(3)

3. Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third country.

Article XI(4)

4. In the case of companies and of nonresident nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories, nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories. A comparable rule shall apply also in the case of companies organized and operated exclusively for scientific, educational, religious or philanthropic purposes.

Sumitomo Shoji dealt with the question whether a U.S. corporation that was wholly owned by a Japanese general trading company was a company of Japan within the meaning of the Treaty of Friendship, Commerce and Navigation between Japan and the United States, April 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863, Article VIII(1) of which provides that "companies of either Party shall be permitted to engage, within the territories of the other Party . . . specialists of their choice." The Court concluded that locally incorporated subsidiaries of Japanese corporations are not companies of Japan, but rather companies of the United States.[8] In doing so, it relied on language identical to that in the closely similar U.S.-Netherlands Treaty.[9]

In the instant case, the treaty language upon which SPNV relies vests rights, if at all, in "nationals and companies of the

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[8] The significance of that issue was that Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, would apply to the U.S. subsidiary's employment practices if it was not a company of Japan protected by Article VIII(1) of the Treaty.

[9] The Treaty of Friendship, Commerce and Navigation, March 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942, and the Treaty of Friendship, Commerce and Navigation, April 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863, are two of the many Friendship, Commerce and Navigation treaties entered into by the United States after the Second World War. The two treaties are closely similar in structure, scope, purpose, and language, as the Government of Japan, appearing in this case as amicus curiae, points out. Not only are the portions of the Treaty with Japan relied on by the Supreme Court in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), substantially identical to their counterparts in the Treaty with the Netherlands (compare Article XXIII(3) of the Japanese Treaty with Article XXIII(3) of the Netherlands Treaty, and compare Articles VII(1), VII(4), VIII(1), and XVI(2) of the Japanese Treaty with the like-numbered provisions in the Netherlands Treaty), but portions of the Netherlands Treaty on which SPNV relies are closely similar to their counterparts in the Japanese Treaty (compare Article VI(3) of the Netherlands Treaty with Article V(1) of the Japanese Treaty, and compare Articles XI(1), XI(3), and XI(4) of the Netherlands Treaty with the like-numbered provisions in the Japanese Treaty).

[Netherlands]." *See* Article I(1); Article VI(3); Article XI(1), (3) and (4). It is clear that a company of the Netherlands which itself transacts business in the United States falls within the zone of interests sought to be protected by the Treaty; but it is also clear from *Sumitomo Shoji* that a U.S. corporation and its foreign parent are not mere extensions of each other, for Treaty purposes.

To extend the treaty language, by construction, specifically to protect Netherlands shareholders of U.S. corporations would in effect accord to those U.S. companies fortunate enough to have Netherlands companies or nationals among their shareholders rights not accorded to corporations the shareholders of which are all United States citizens. Such a result would be exactly contrary to the conclusion of a unanimous Court in *Sumitomo Shoji* that the purpose of the Frendship, Commerce and Navigation treaties negotiated in the post-World War II period was to assure foreign corporations the right to transact commercial business themselves, or to form locally incorporated subsidiaries, on an equal basis with U.S. concerns, and *not* to accord to the domestic subsidiaries of foreign parents rights not shared by other U.S. corporations. Id. at 188. Thus, the court will not strain to read into the Treaty an implied right of action by Netherlands shareholders of U.S. companies, as shareholders, when such a construction would, for example, permit SPNV to maintain an action to enjoin state tax assessments against Shell Oil, although U.S. oil companies not partially owned by a Netherlands shareholder would not have such a right of action. In view of the importance the Supreme Court has recently placed on the Tax Injunction Act, and in view of the fact that an action by shareholders to enjoin the collection of a state tax assessed against a corporation, such a construction of the Treaty would be particularly inappropriate in a tax case. It would contravene the purposes of the Act, *see* pp. 6-7, *supra*, by permitting such injunctions at all, and particularly by permitting them at the instance of U.S. corporations with Netherlands shareholders while denying them to U.S. corporations the shareholders of which do not include Netherlands nationals or companies.

Therefore, the court concludes that the Treaty in question here does not create a right of action in favor of Netherlands shareholders as shareholders to redress an injury to the corporation; and SPNV's standing cannot rest on the provisions of this Treaty.

Nor can SPNV's standing rest on the provisons of the Double Taxation Convention. The provision of the Convention on which SPNV relies, Article XXV(4), provides:

> (4) A corporation of one of the Contracting States, the capital of which is wholly or partly owned by one or more citizens or corporations of the other Contracting State, shall not be subjected in the former Contracting State to more burdensome taxes than is a corporation of the former Contracting State, the capital of which is wholly owned by the one or more citizens or corporations of that former Contracting State.

This provision, of course, vests rights, if at all, in the locally incorporated subsidiary of the foreign parent. Nothing is said about creating a right of action by the shareholder as a shareholder. Shell Oil and Scallop Nuclear might assert claims based on this provision, but SPNV may not.

Because neither the Treaty nor the Convention specifically creates a right of action by foreign shareholders, as shareholders, to redress an injury to a U.S. corporation, SPNV lacks standing to maintain its claim.

III. RIPENESS

Because SPNV has brought this action under 42 U.S.C. §1983, it is not to be subjected to a requirement that it exhaust its state administrative remedies. *Patsy v. Board of Regents*, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). But the requirement that a controversy be ripe for adjudication applies to actions brought under §1983, even though the exhaustion requirement does not. *Portland Police Association v. City of Portland*, 658 F.2d 1272 (9th Cir. 1981). Even if SPNV had standing to maintain this action, it would have to be dismissed as unripe.

For a case to be justiciable, a plaintiff must complain of threatened injury that is both "certain" and "immediate". *Portland Police Association v. City of Portland*, 658 F.2d at 1273. Contingent events that might intervene at a future time and moot the controversy have often been held sufficient to require dismissal. *See id.* at 1274; *Excess and Casualty Reinsurance Association v. Insurance Commissioner of California*, 656 F.2d 491, 497 (9th Cir. 1981); *Stewart v. M.M. & P. Pension Plan*, 608 F.2d 776 (9th Cir. 1979). Moreover, if a state statute or regulation under attack has not yet been fully applied to the plaintiff by an administrative agency, the action would not be ripe "if the issue would be illuminated by the development of a better factual record. . . ." *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*, 659 F.2d 903, 915 (9th Cir. 1981).

The present posture of this case at the administrative level, according to SPNV, is as follows. SPNV represents that the Board has demanded information of Scallop Nuclear, but that no notice of proposed assessment has yet been issued to Scallop Nuclear. Auditors for the Board have prepared a report proposing that the Board issue such a notice for tax years 1973-76, but the Board has not acted on this proposal. The Board has demanded information of Shell Oil, and issued to Shell Oil notices of proposed assessments for tax years 1967-72. These notices propose assessments of additional taxes, as well as penalties for failure to provide requested information. Shell Oil has formally protested the proposed assessments, and has petitioned the Board pursuant to Cal. Rev. & Tax. Code § 25137, requesting that the "unitary business enterprise" for purposes of Shell Oil's tax be reduced in scope to include only Shell Oil and its subsidiaries. The Board has not acted on its protest or petition. The Board is "preparing to issue" to Shell Oil notices of proposed assessments for tax years 1973-76; and these proposed assessments "may" also include proposed penalties for failure to supply requested information.

Because no notice of a proposed assessment has been submitted to Scallop Nuclear, the controversy is unripe as to that taxpayer. The threatened injury to Scallop Nuclear is not sufficiently certain and immediate to be justiciable. Shell Oil, of course, has allegedly been notified of a proposed assessment. But even as to Shell Oil the statute has not been fully applied. The statutory scheme at issue entitles the taxpayer to a hearing after the filing of its protest, with final action by the Board only after the hearing. An appeal lies to the State Board of Equalization. *See* Cal. Rev. & Tax. Code §§ 25665-25667. It does not appear that Shell Oil or Scallop Nuclear have undergone this process.

During the hearing and appeal process, the Franchise Tax Board and Board of Equalization would presumably be applying the Bank and Corporation Tax Law with the decisions of the Supreme Court in *Asarco Inc. v. Idaho State Tax Commission*, 102 S.Ct. 3103, 73 L.Ed.2d 787 (1982), and *F. W. Woolworth Co. v. Taxation and Revenue Department of New Mexico*, 102 S.Ct. 3128, 73 L.Ed.2d 819 (1982) in mind. These cases, decided while these motions were under submission, reversed state supreme court decisions that had upheld taxation of formula-apportioned income received from foreign subsidiaries of the taxpayers. They clarify the definition of "unitary business" which can pass muster under the due process clause. Just how the Board will apply the Bank and Corporation Tax Law now remains to be seen.

In the course of these proceedings, Shell Oil and Scallop Nuclear might be asked to provide financial information or pay penalties if they resist. Such demands might or might not be unlawful. But in view of both the strong congressional policy and the equity-based views of the Supreme Court that taxpayers ought first to subject themselves to the state's exactions as a precondition to a challenge to the lawfulness of its actions, *California v. Grace Brethren Church*, 102 S.Ct. at 2512-13; *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981), this court will not interpose itself merely to prevent the state from demanding information of the taxpayers.

IV. CONCLUSION

In oral argument, SPNV cited *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), as support for its contention that the international dimension of this case requires that this court reach the merits, even if problems of standing or ripeness might otherwise require it to stop short of a decision on the merits. But *McCulloch* does not stand for the proposition that a district court possesses the inherent power to brush aside doctrines of nonjusticiability merely because the subject matter of an action affects overseas interests. In *McCulloch*, the Court concluded that the district court had had jurisdiction to enjoin an order of the National Labor Relations Board requiring an election among seamen aboard a Honduran vessel. The Court held that the action fell within what is called the "limited" exhaustion doctrine exception of *Leedom v. Kyne*, 358 U.S. 184 (1958), which had permitted judicial intervention in acts of the Board that are " 'in excess of its delegated powers and contrary to a specific prohibition in the [National Labor Relations] Act.' " *McCulloch*, 372 U.S. at 16 (quoting *Leedom V. Kyne*, 358 U.S. at 188). The *McCulloch* Court remarked that an "overriding consideration" in permitting early intervention was the need for prompt judicial resolution of the controversy over the scope of the Board's power, in view of the "international problems for our Government" which the Board's assertion of power was then creating. *Id.* at 16, 17.

McCulloch is a far cry from this case. The federal forum in *McCulloch* was not confronted with state tax proceedings and the strong policy considerations underlying the Tax Injunction Act. This court will accept *McCulloch* for what it is, a "totally unique situation," *Confederated Independent Unions v. Rockwell-Standard Co.*, 465 F.2d 1137, 1141 n.11 (3d Cir. 1972), which should not be extended beyond its intended scope as a limited exception to requirements of exhaustion of administrative remedies in very rare circumstances.

It is therefore ordered that the action be DISMISSED.

Dated: August 1, 1983

/s/ MARILYN HALL PATEL

Marilyn Hall Patel
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHELL PETROLEUM, N.V.,

Plaintiff/Appellant,

vs.

MARY ANN GRAVES, KENNETH CORY, ERNEST J. DRONENBURG, JR., individually and as members of, and GERALD H. GOLDBERG, individually and Executive Officer of, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,

Defendants/Appellees.

No. 82-4535
DC CV 81-4302
MHP
JUDGMENT

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY
ATTEST JUL 22 1983
PHILLIP B. WINBERRY
Clerk of Court
by: /s/ OSCAR TAGLE
Deputy Clerk

Filed and entered June 30, 1983

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SHELL PETROLEUM N.V., *Plaintiff,* vs. MARY ANN GRAVES, KENNETH CORY, ERNEST J. DRONENBURG, JR., individually and as members of, and GERALD H. GOLDBERG, individually and as Executive Officer of, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA, *Defendants.*	No. C-81-4302 MHP JUDGMENT Fed. R. Civ. P. 58

This action having come before this Court, the Honorable Marilyn Hall Patel, United States District Judge, presiding, and the issues having been duly presented and a Memorandum Decision and Order having been duly filed herein.

IT IS ORDERED AND ADJUDGED that this action is dismissed.

/s/ MARILYN HALL PATEL
Marilyn Hall Patel
United States District Judge

10 August 1982.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 8, cl. 3 (Foreign Commerce Clause)

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

Article III, § 2 (Federal Judicial Power Clause)

The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .

Amend XIV, § 1 (Due Process Clause)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of The Netherlands

Treaty, with protocol and exchange of notes, signed at The Hague March 27, 1956;

Ratification advised by the Senate of the United States of America July 11, 1956;

Ratified by the President of the United States of America September 14, 1956;

Ratified by the Netherlands September 20, 1957;

Ratifications exchanged at Washington November 5, 1957;

Proclaimed by the President of the United States of America November 15, 1957;

Entered into force December 5, 1957.

The United States of America and the Kingdom of the Netherlands, desirous of strengthening the bonds of peace and friendship traditionally existing between them and of encouraging closer economic and cultural relations between their peoples, and being cognizant of the contributions which may be made toward these ends by arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments, and establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, based in general upon the principles of national and unconditional most-favored-nation treatment reciprocally accorded, and for that purpose have appointed as their Plenipotentiaries: the President of the United States of America: H.E. Mr. H. Freeman Matthews, Ambassador extraordinary and plenipotentiary of the United States of America at The Hague, and Her Majesty the Queen of the Netherlands: H.E. Dr. J. W. Beyen, Minister of Foreign Affairs, and H.E. Dr. J. M. A. H. Luns, Minister without Portfolio, who, having communicated to each other their full powers found to be in due form, have agreed as follows:

Article I

1. Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests.

2. Between the territories of the two Parties there shall be, in accordance with the provisions of the present Treaty, freedom of commerce and navigation.

Article II

1. Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (*a*) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (*b*) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital; and (*c*) for other purposes subject to the laws relating to the entry and sojourn of aliens.

2. Each Party undertakes to make available the best facilities practicable for travel by tourists and other visitors with respect to their entry, sojourn and departure, and for the distribution of information for tourists.

3. Nationals of either Party, within the territories of the other Party, shall be permitted: (*a*) to travel therein freely, and to reside at places of their choice; (*b*) to enjoy liberty of conscience; (*c*) to hold both private and public religious services; (*d*) to gather and to transmit material for dissemination to the public abroad; and (*e*) to communicate with other persons inside and outside such territories by mail, telegraph and other means open to general public use.

4. The provisions of the present Article shall be subject to the right of either Party to apply measures that are necessary to maintain public order and protect the public health, morals and safety.

Article III

1. Nationals of either Party within the territories of the other Party shall be free from molestations of every kind, and shall receive the most constant protection and security. They shall be accorded in like circumstances treatment no less favorable than that accorded nationals of such other Party for the protection and security of their persons and their rights. The treatment accorded in this respect shall in no case be less favorable than that accorded nationals of any third country or that required by international law.

2. If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified and shall have the right to visit and communicate with such national. Such national shall: (*a*) receive reasonable and humane treatment; (*b*) be promptly informed of the accusations against him; (*c*) be brought to trial as promptly as is consistent with the proper preparation of his defense; and (*d*) enjoy all means reasonably necessary to his defense, including the services of competent counsel of his choice.

Article IV

1. Nationals of either Party shall be accorded national treatment in the application of laws and regulations within the territories of the other Party that establish a pecuniary compensation or other benefit of service, on account of disease, injury or death arising out of and in the course of employment or due to the nature of employment.

2. In addition to the rights and privileges provided in paragraph 1 of the present Article, nationals of either Party shall, within the territories of the other Party, be accorded national treatment in the application of laws and regulations establishing compulsory systems of social security, under which benefits are paid without an individual test of financial need in the following cases: (*a*) sickness, including temporary disability

for work, and maternity; (*b*) invalidity, or occupational disability; (*c*) death of father, spouse, or any other person liable for maintenance; (*d*) unemployment.

Article V

1. Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.

2. (*a*) Contracts entered into between nationals or companies of either Party and nationals or companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. *(b)* In conformity with subparagraphs (*1*) and (*2*) hereof, awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party. (*1*) As regards recognition and enforcement in the United States of America, such awards shall be entitled in any court in any State thereof only to the same measure of recognition and enforcement as awards rendered in other States thereof. (*2*) As regards enforcement in the Kingdom of the Netherlands, such awards shall be dealt with in the same way as awards as referred to in the Convention on the execution of foreign arbitral awards concluded at Geneva on September 26, 1927.

Article VI

1. Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party.

2. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either Party located within the territories of the other Party shall not be subject to molestation or to entry without just cause. Official searches and examinations of such premises and their contents, when necessary, shall be made only according to law and with careful regard for the convenience of the occupants and the conduct of business.

3. Neither Party shall take unreasonable or discriminatory measures that would impair the rights or interests within its territories of nationals and companies of the other Party, whether in their capital, or in their enterprises and the property thereof, or in the skills, arts or technology which they have supplied.

4. Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public interest, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

5. Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 4 of the present Article. Moreover, enterprises in which nationals and companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control or administration.

Article VII

1. Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activity for gain (business activities) within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (*a*) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (*b*) either directly or indirectly through one or more intermediaries, to organize companies under the general company laws of such other Party and to acquire the controlling interest in companies of such other Party; (*c*) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

2. Each Party reserves the right to limit the extent to which aliens may within its territories establish, acquire interests in, or carry on enterprises engaged in communications, air or water transport, banking involving depository or fiduciary functions, or the exploitation of land or other natural resources. However, new limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on such activities within its territories, shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by nationals and companies of the other Party. Moreover, neither Party shall deny to transportation, communications and banking companies of the other Party the right to maintain branches and agencies, in conformity with the applicable laws and regulations, to perform

functions necessary for essentially international operations in which they engage.

3. The provisions of paragraph 1 of the present Article shall not prevent either Party from prescribing special formalities in connection with the establishment of alien-controlled enterprises within its territories; but such formalities may not impair the substance of the rights set forth in said paragraph.

4. Nationals and companies of either Party, as well as enterprises controlled by such nationals and companies, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article.

Article VIII

1. Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

2. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious and philanthropic activities within the territories of the other Party, and shall be accorded the right to form associations for that purpose under the laws of such other Party.

Article IX

1. Nationals and companies of the Kingdom of the Netherlands shall be accorded, within the territories of the United States of America: (*a*) national treatment with respect to leasing land, buildings and other real property appropriate to the conduct of activities in which they are permitted to engage pursuant to Articles VII and VIII and for residential purposes and with respect to occupying and using such property; and (*b*) other rights in real property permitted by the applicable laws of the States, Territories and possessions of the United States of America.

2. Nationals and companies of the United States of America shall be accorded, within the territories of the Kingdom of the Netherlands, national treatment with respect to acquiring by purchase, lease, or otherwise, and with respect to owning, occupying and using land, buildings and other real property. However, in the case of any such national domiciled in, or any such company constituted under the laws of, any State, Territory or possession of the United States of America that accords less than national treatment to nationals and companies of the Kingdom of the Netherlands in this respect, the Kingdom of the Netherlands shall not be obligated to accord to such national or company treatment more favorable in this respect than such State, Territory or possession accords to nationals and companies of the Kingdom of the Netherlands.

3. Nationals and companies of either Party shall be accorded within the territories of the other Party national treatment and most-favored-nation treatment with respect to acquiring, by purchase, lease, or otherwise, and with respect to owning and possessing, personal property of all kinds, both tangible and intangible. However, either Party may impose restrictions on alien ownership of materials dangerous from the standpoint of public safety and alien ownership of interests in enterprises carrying on particular types of activity, but only to the extent that this can be done without impairing the rights and privileges secured by Article VII or by other provisions of the present Treaty.

4. Nationals and companies of either Party shall be accorded national treatment within the territories of the other Party with respect to acquiring property of all kinds by testate or intestate succession or through judicial process. Should they because of their alienage be ineligible to continue to own any such property, they shall be allowed a reasonable period in which to dispose of it, in a normal manner at its market value.

5. Nationals and companies of either Party shall be accorded within the territories of the other Party national treatment and most-favored-nation treatment with respect to disposing of property of all kinds. Furthermore, with respect to the acquisition, ownership, use and disposition of property of all kinds within the territories of either Party, companies constituted under the laws of that Party, which are controlled by nationals and companies of the other Party, shall be accorded treatment no less favorable than that accorded within such territories to companies of such other Party or to companies similarly constituted which are controlled by nationals and companies of any third country.

Article X

1. Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment with respect to obtaining and maintaining patents of invention, and with respect to rights in trade marks, trade names, trade labels and industrial property of every kind.

2. The Parties agree as to the desirability of furthering, through cooperative or other appropriate means, the interchange and use of scientific and technical knowledge, particularly in the interest of increasing productivity and improving standards of living within their respective territories.

Article XI

1. Nationals of either Party residing within the territories of the other Party, and nationals and companies of either Party

engaged in trade or other gainful pursuit or in scientific, educational, religious or philanthropic activities within the territories of the other Party, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, within the territories of such other Party, more burdensome than those borne by nationals and companies of such other Party.

2. With respect to nationals of either Party who are neither resident nor engaged in trade or other gainful pursuit within the territories of the other Party, and with respect to companies of either Party which are not engaged in trade or other gainful pursuit within the territories of the other Party, it shall be the aim of such other Party to apply in general the principle set forth in paragraph 1 of the present Article.

3. Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third country.

4. In the case of companies and of non-resident nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories, nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories. A comparable rule shall apply also in the case of companies organized and operated exclusively for scientific, educational, religious or philanthropic purposes.

5. Each Party reserves the right to: (*a*) extend specific tax advantages on the basis of reciprocity; (*b*) accord special tax advantages by virtue of agreements for the avoidance of double taxation or the mutual protection of revenue; and (*c*) accord to

its own nationals and to residents of contiguous countries more favorable exemptions of a personal nature with respect to income and inheritance taxes than are accorded to other non-resident persons.

Article XII

1. Nationals and companies of either Party shall be accorded by the other Party national treatment and most-favord-nation treatment with respect to payments, remittances and transfers of funds or financial instruments between the territories of the two Parties as well as between the territories of such other Party and of any third country.

2. Neither Party shall impose exchange restrictions as defined in paragraph 5 of the present Article except to the extent necessary to maintain or restore adequacy in its monetary reserves, particularly in relation to its external commercial and financial requirements. It is understood that the provisions of the present Article do not alter the obligations either Party may have to the International Monetary Fund or preclude imposition of particular restrictions whenever the Fund specifically authorizes or requests a Party to impose such particular restrictions.

3. If either Party imposes exchange restrictions in accordance with paragraph 2 of the present Article, it shall, after making whatever provision may be necessary to assure the availability of foreign exchange for goods and services essential to the health and welfare of its people, make reasonable provision for the withdrawal, in foreign exchange in the currency of the other Party, of: (*a*) the compensation referred to in Article VI, paragraph 4, (*b*) earnings, whether in the form of salaries, interest, dividends, commissions, royalties, payments for technical services, or otherwise, and (*c*) amounts for amortization of loans, depreciation of direct investments, and capital transfers to the extent feasible, giving consideration to special needs for other transactions. If more than one rate of

exchange is in force, the rate applicable to such withdrawals shall be a rate which is specifically approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, an effective rate which, inclusive of any taxes or surcharges on exchange transfers, is just and reasonable.

4. Exchange restrictions shall not be imposed by either Party in a manner unnecessarily detrimental or arbitrarily discriminatory to the claims, investments, transport, trade, and other interests of nationals and companies of the other Party, nor to the competitive position thereof. Each Party shall afford the other Party adequate opportunity for consultation at any time regarding application of the present Article.

5. The term "exchange restrictions" as used in the present Article includes all restrictions, regulations, charges, taxes, or other requirements imposed by either Party which burden or interfere with payments, remittances, or transfers of funds or of financial instruments between the territories of the two Parties.

6. Questions arising under the present Treaty concerning exchange control are governed by the provisions of the present Article.

Article XIII

Commercial travelers representing nationals and companies of either Party engaged in business within the territories thereof shall, upon their entry into and departure from the territories of the other Party and during their sojourn therein, be accorded most-favored-nation treatment in respect of the customs and other matters, including, subject to the exceptions in paragraph 5 of Article XI, taxes and charges applicable to them, their samples and the taking of orders, and regulations governing the exercise of their functions.

Article XIV

1. Each Party shall accord most-favored-nation treatment to products of the other Party, from whatever place and by whatever type of carrier arriving, and to products destined for exportation to the territories of such other Party, by whatever route and by whatever type of carrier, with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation.

2. Neither Party shall impose restrictions or prohibitions on the importation of any product of the other Party, or on the exportation of any product to the territories of the other Party, unless the importation of the like product of, or the exportation of the like product to, all third countries is similarly restricted or prohibited.

3. If either Party imposes quantitative restrictions on the importation or exportation of any product in which the other Party has an important interest: (*a*) it shall as a general rule give prior public notice of the total amount of the product, by quantity or value, that may be imported or exported during a specified period, and of any change in such amount or period; and (*b*) if it makes allotments to any third country, it shall afford such other Party a share proportionate to the amount of the product, by quantity or value, supplied by or to it during a previous representative period, due consideration being given to any special factors affecting the trade in such product.

4. Either Party may impose prohibitions or restrictions on sanitary or other customary grounds of a non-commercial nature, or in the interest of preventing deceptive or unfair practices, provided such prohibitions or restrictions do not arbitrarily discriminate against the commerce of the other Party.

5. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment by the other Party with respect to all matters relating to importation and exportation.

6. Notwithstanding the provisions of paragraphs 2 and 3 (*b*) of the present Article, a Party may apply restrictions or controls on importation and exportation of goods that have effect equivalent to, or which are necessary to make effective, exchange restrictions applied pursuant to Article XII. However, such restrictions or controls shall depart no more than necessary from the aforesaid paragraphs and shall be conformable with a policy designed to promote the maximum development of nondiscriminatory foreign trade and to expedite the attainment both of a balance-of-payments position and of monetary reserves which will obviate the necessity of such restrictions.

Article XV

1. Each Party shall promptly publish laws, regulations and administrative rulings of general application pertaining to rates of duty, taxes or other charges, to the classification of articles for customs purposes, and to requirements or restrictions on imports and exports or the transfer of payments therefor, or affecting their sale, distribution or use; and shall administer such laws, regulations and rulings in a uniform, impartial and reasonable manner. As a general practice, new administrative requirements or restrictions affecting imports, with the exception of those imposed on sanitary grounds or for reasons of public safety, shall not go into effect before the expiration of a reasonable time, in the light of circumstances.

2. Each Party shall provide an appeals procedure under which nationals and companies of the other Party, and importers of products of such other Party, shall be able to obtain prompt and impartial review, and correction when warranted, of administrative action relating to customs matters, including the imposition of fines and penalties, confiscations, and rulings on questions of customs classification and valuation by the administrative authorities.

3. Penalties imposed by either Party for infractions of the customs and shipping laws and regulations concerning documentation shall be no greater than necessary to serve merely as a warning in the case of clerical errors and of errors made without fraudulent intent or gross negligence.

4. With reference to marking requirements applicable to imported products, each Party shall as a general practice: (*a*) allow required marks of origin to be affixed after importation; (*b*) not permit markings that result in misrepresenting the true origin of the products; and (*c*) not apply requirements that entail an expense which is economically prohibitive or that result in seriously damaging the product.

5. Neither Party shall impose any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either Party.

Article XVI

1. Products of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage and use.

2. Articles produced by nationals and companies of either Party within the territories of the other Party, or by companies of the latter Party controlled by such nationals and companies, shall be accorded therein treatment no less favorable than that accorded to like articles of national origin by whatever person or company produced, in all matters affecting exportation, taxation, sale, distribution, storage and use.

Article XVII

1. Each Party undertakes (*a*) that enterprises owned or controlled by its Government, and that monopolies or agencies granted exclusive or special privileges within its territories, shall make their purchases and sales involving either imports or

exports affecting the commerce of the other Party solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale; and (*b*) that the nationals, companies and commerce of such other Party shall be afforded adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases and sales.

2. Each Party shall accord to the nationals, companies and commerce of the other Party fair and equitable treatment, as compared with that accorded to the nationals, companies and commerce of any third country, with respect to: (*a*) the governmental purchase of supplies; (*b*) the awarding of concessions and other government contracts; and (*c*) the sale of any service sold by the Government or by any monopoly or agency granted exclusive or special privileges.

Article XVIII

1. The Parties recognize that conditions of competitive equality should be maintained in situations in which publicly owned or controlled trading or manufacturing enterprises of either Party engage in competition, within the territories thereof, with privately owned and controlled enterprises of nationals and companies of the other Party. Accordingly, such state-owned enterprises should not be given special economic privileges in order to injure the competitive position of such private enterprises. However, this principle shall not be construed to prevent either Party from making such special concessions in aid of state-owned enterprises as it deems necessary during periods of economic crises, especially to relieve unemployment. This principle, moreover, is without prejudice to special advantages given in connection with: (*a*) manufacturing goods for government use, or supplying goods and services to the Government for government use; or (*b*) supplying, at prices substantially below competitive prices, the needs of particular population groups for essential goods and services not otherwise practically obtainable by such groups.

2. No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, to the extent that it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

Article XIX

1. Vessels under the flag of either Party, and carrying the papers required by its laws in proof of nationality, shall be deemed to be vessels of that Party both on the high seas and within the ports, places and waters of the other Party.

2. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other Party; but each Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade and inland navigation.

3. Vessels of either Party shall be accorded national treatment and most-favored-nation treatment with respect to the right to carry all cargo that may be carried by vessel to or from the territories of the other Party.

4. Goods carried by vessels under the flag of either Party to or from the territories of the other Party shall enjoy the same favors as when transported in vessels sailing under the flag of such other Party. This applies especially with regard to customs duties and all other fees and charges, to bounties, drawbacks and other privileges of this nature, as well as to the administration of the customs and to transport to and from port by rail and other means of transportation.

5. If a vessel of either Party runs aground or is wrecked on the coasts of the other Party, or if it is in distress and must put into a port of the other Party, the latter Party shall extend to the vessel as well as to the crew, the passengers, the personal property of crew and passengers, and to the cargo of the vessel, the same protection and assistance as would have been extended to a vessel under its own flag in like circumstances; and shall permit the vessel after repairs to proceed with its voyage upon conformity with the laws applicable alike to vessels under its own flag. Articles salvaged from the vessel shall be exempt from all customs duties unless they pass into internal consumption; but articles not entered for consumption may be subject to measures for the protection of the revenue pending their exit from the country.

6. The term "vessels", as used herein, means all types of vessels, whether privately owned or operated, or publicly owned or operated, except vessels of war. This term does not, except with reference to paragraphs 1 and 5 of the present Article and Article XX, include fishing vessels.

Article XX

1. In all ports of either Party the masters of all vessels under the flag of the other Party, whose crews have ceased to be fully constituted on account of illness or for any other cause, shall be permitted to engage such seamen as may be necessary for the continuation of the voyage.

2. Nationals of either Party who are seamen may be sent to ports of the other Party to join national vessels, in care of consular officers, either individually or in groups on the basis of seamen's papers issued in lieu of passports. Likewise, nationals of either Party shall be permitted to travel through the territory of the other Party on their way to join vessels or to be repatriated on the basis of seamen's papers used in lieu of passports.

Article XXI

There shall be freedom of transit through the territories of each Party by the routes most convenient for international transit: (*a*) for nationals of the other Party, together with their baggage; (*b*) for other persons, together with their baggage, en route to or from the territories of such other Party; and (*c*) for products of any origin en route to or from the territories of such other Party. Such persons and things in transit shall be exempt from customs duties, from duties imposed by reason of transit, and from unreasonable charges and requirements; and shall be free from unnecessary delays and restrictions. They shall, however, be subject to measures referred to in paragraph 4 of Article II, and to nondiscriminatory regulations necessary to prevent abuse of the transit privilege.

Article XXII

1. The present Treaty shall not preclude the application of measures by either Party: (*a*) regulating the importation or exportation of gold or silver; (*b*) relating to fissionable materials, to radioactive by-products of the utilization or processing thereof, or to materials that are the source of fissionable materials; (*c*) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; (*d*) necessary to fulfil its obligations for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests; (*e*) denying to any company in which nationals of any third country or countries enjoy directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts; and (*f*) regarding its national fisheries and the landing of the products thereof.

2. The most-favored-nation provisions of the present Treaty shall not apply to advantages accorded by: (*a*) the

United States of America or its Territories and possessions to one another, to the Republic of Cuba, to the Republic of the Philippines, to the Trust Territory of the Pacific Islands or to the Panama Canal Zone; or (*b*) by the Parts of the Kingdom of the Netherlands to one another, by the Netherlands to its Benelux-partners (Belgium, including its Overseas and Trust Territories, and Luxembourg), or by the Kingdom of the Netherlands to the Republic of Indonesia.

3. The most-favored-nation treatment provisions of the present Treaty shall not apply to advantages accorded by either Party to adjacent countries in order to facilitate frontier traffic, or by virtue of a customs union or free trade area of which either Party may become a member, after having informed the other Party of its plans and having afforded it opportunity to express its views thereon.

4. The provisions of the present Treaty relating to the treatment of goods shall not preclude action by either Party which is required or specifically permitted under the General Agreement on Tariffs and Trade during such time as such Party is a contracting party to the General Agreement. Similarly, the most-favored-nation provisions of the present Treaty shall not apply to special advantages accorded by virtue of the aforesaid Agreement.

5. Nationals of either Party admitted into the territories of the other Party for limited purposes shall not enjoy rights to engage in gainful occupations in contravention of limitations expressly imposed, according to law, as a condition of their admittance.

6. Nothing in the present Treaty shall be deemed to grant or imply any right to engage in political activities.

Article XXIII

1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

2. The term "most-favored-nation treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country.

3. As used in the present Treaty, the term "companies" means corporations, partnerships, companies, foundations, associations, and other legal entities or juridical persons, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

4. National treatment accorded under the provisions of the present Treaty to companies shall: (*a*) as regards companies of the Kingdom of the Netherlands, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories and possessions of the United States of America; and (*b*) as regards companies of the United States of America, in any Part of the Kingdom of the Netherlands, be the treatment accorded therein to companies created or organized in any other Part of the Kingdom. Furthermore, in any Part of the Kingdom of the Netherlands outside Europe, national treatment accorded to nationals of the United States of America shall be the treatment accorded in such Part to Netherlands nationals not born in that Part.

Article XXIV

The territories to which the present Treaty extends shall comprise all areas of land and water under the jurisdiction of each Party, as well as any territory for which it has international responsibility, other than the Panama Canal Zone and the Trust Territory of the Pacific Islands, provided that it shall not apply with respect to Surinam or the Netherlands Antilles, respectively, until one month after the receipt by the Government of the

United States of America of notifications of such application by the Kingdom of the Netherlands.

Article XXV

1. Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the present Treaty.

2. Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.

Article XXVI

The present Treaty shall replace the convention of commerce and navigation signed at Washington August 26, 1852, and the agreement in regard to trade marks effected by exchange of notes signed at Washington February 10 and 16, 1883.

Article XXVII

1. The present Treaty shall be ratified, and the ratifications thereof shall be exchanged at Washington as soon as possible.

2. The present Treaty shall enter into force one month after the day of exchange of ratifications. It shall remain in force for ten years and shall continue in force thereafter until terminated as provided herein.

3. Either Party may, by giving one year's written notice to the other Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter with respect to all the territories to which it applies or with respect to Surinam or the Netherlands Antilles.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present Treaty and have affixed hereunto their seals.

DONE in duplicate, in the English and Netherlands languages, both texts being equally authentic, at The Hague, this 27th day of March, one thousand nine hundred fifty-six.

For the United States of America:

H. FREEMAN MATTHEWS

For the Kingdom of the Netherlands:

J W BEYEN
J M A H LUNS

[SEAL]

Protocol

At the time of signing the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of the Netherlands, the undersigned Plenipotentiaries, duly authorized by their respective Governments, have further agreed on the following provisions, which shall be considered integral parts of the aforesaid Treaty:

1. The spouse and unmarried minor children of a person permitted entry under the provisions of Article II, paragraph 1 (*a*) and (*b*), shall also be permitted entry if accompanying him or following to join him.

2. The provisions of Article II, paragraph 1 (*b*), shall be construed to extend to persons who represent nationals and companies of the same nationality which have invested or are actively in the process of investing a substantial amount of capital in an enterprise in the territories of the other Party, and who are employed by such nationals and companies in a responsible capacity.

3. With respect to Article II, paragraph 1, and the first sentence of Article VIII, paragraph 1, nationals of the United States of America shall be accorded in any Part of the Kingdom of the Netherlands outside Europe the treatment accorded therein to Netherlands nationals not born in that Part.

4. The provisions of Article IV, paragraph 2, refer only to laws or regulations which either are national laws or regulations or are based in whole or in part on requirements of national laws or regulations. Moreover, that paragraph shall not be construed to prevent a Party from relieving aliens temporarily resident within its territories from coverage under its contributory social security system.

5. The term "access" as used in Article V, paragraph 1, comprehends, among other things, legal aid, costfree access to the courts and exemption from security for costs.

6. The provisions of Article VI, paragraph 4, providing for the payment of compensation shall extend to interests held directly or indirectly by nationals and companies of either Party in property which is taken within the territories of the other Party.

7. The provisions of Article VII do not obligate either Party to permit nationals and companies of the other Party to carry on businesses in its territories without fulfilling the requirements which are generally applicable by law.

8. The activities referred to in Article VII, paragraph 1, do not include the practice of professions.

9. With reference to Article VII, paragraph 1, it is understood that either Party may, consistently with the terms and intent of the Treaty, apply special requirements to alien insurance companies with a view to assuring that such companies maintain standards of accountability and solvency comparable with those required of like domestic companies, so long as such requirements do not have the effect of discrimination in substance against such alien companies.

10. It is agreed that, on a reciprocity basis, the first sentence of Article VII, paragraph 2, shall not apply to the establishment of, or the acquisition of interests in, or the control, operation and management of, companies of either Party for engaging in the exploration for and exploitation of petroleum and other mineral resources within the territories of that Party, by nationals or companies of the other Party.

11. The provisions of the first sentence of Article VIII, paragraph 1, shall not be construed to affect the right of the Netherlands to require that aliens may not be employed in the Netherlands unless the appropriate permits have been granted. However, in keeping with the terms of that paragraph, the regulations governing employment shall be applied in a liberal fashion.

12. Nothing in the present Treaty shall be construed to supersede any provision of the Convention between the Kingdom of the Netherlands and the United States of America with respect to taxes on income and certain other taxes, signed at Washington April 29, 1948.

13. The treatment provided in Article XII, paragraph 1, as clarified by reference to Article XXIII, paragraphs 1 and 2, is designed only to preclude discrimination on the ground of nationality and does not, for instance, preclude different treatment of different currencies or the application of residence requirements.

14. Either Party may impose restrictions on the introduction of foreign capital as may be necessary to protect its monetary reserves as provided in Article XII, paragraph 2, or to prevent serious monetary disturbances arising from speculative financial operations.

15. It is understood that for the purposes of Article XVII, paragraph 1, availability of means of payment is considered to be a commercial consideration.

16. The provisions of Article XVII, paragraph 2 (*b*) and (*c*), and of Article XIX, paragraph 3, shall not apply to postal services.

17. It is understood that the word "cargoes" as used in paragraph 2 and the word "cargo" as used in paragraph 3, of Article XIX, shall be deemed to comprehend passengers as well as goods.

18. With reference to Article XXII, paragraph 1 (*d*), it is understood that it is not the purpose of the security reservation to create a basis for unduly prolonged departures from any provision of the Treaty. On the other hand, each Party determines, according to its own best judgment, the measures deemed necessary to protect its essential security interests.

19. The provisions of Article XXII, paragraph 2, shall apply in the case of Puerto Rico regardless of any change that may take place in its political status.

20. Article XXIV does not apply to territories under the authority of either Party solely as a military base or by reason of temporary military occupation.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present Protocol and have affixed hereunto their seals.

DONE in duplicate, in the English and Netherlands languages, both texts being equally authentic, at The Hague, this 27th day of March, one thousand nine hundred fifty-six.

For the United States of America:

H. FREEMAN MATTHEWS

For the Kingdom of the Netherlands:

J W BEYEN
J M A H LUNS

[SEAL]

DIPLOMATIC CORRESPONDENCE CONCERNING UNITARY TAXATION

Notes by the European Economic Community

EMBASSY OF GREECE
Washington, D.C.

The Embassy of Greece presents its compliments to the Department of State and, on behalf of the Ten European Community Governments, of which the Government of Greece has now the presidency, it has the honor to forward the attached Note on the problems of the unitary method of taxation.

The Embassy of Greece welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., August 1, 1983

ATTACHED: Note

THE DEPARTMENT OF STATE
WASHINGTON, D.C.

[SEAL]

UNITARY TAXATION

I. Our governments refer to their note on unitary taxation forwarded to the Department of State by the Embassy of Belgium on 29 June 1982.

II. That note drew the attention of the State Department to the case before the Supreme Court of the Container Corporation of America versus the California Franchise Tax Board and urged as a matter of high priority that the government of the United States should participate in that case as amicus curiae. The decision was handed down by the court on 27 June, 1983, and the court found that application of the unitary business principle by the State of California to Container Corporation and its foreign subsidiaries was proper. A majority of justices held that that fact that no brief had been submitted on behalf of the United States government meant there was no indication that the position taken by the government in the case of the Chicago Bridge and Iron Company still represented its views or that the brief in the Chicago Bridge case applied to the Container case.

III. Although the Supreme Court decision did not apply to US companies with foreign parents, our governments were disappointed by the Container decision. They remain convinced that the unitary basis of taxation with combined reporting, particularly as applied in the international field, is unsatisfactory. Our governments therefore urge that the United States government should give strong support to legislation to ensure that States do not use that method of taxation at least for the subsidiaries of foreign corporations. There are currently two relevant bills in Congress, HR 2918 and S. 1225.

IV. It is particularly important that federal legislation should be adopted at an early stage since there are already signs that, following the decision in the Container case, other American States not at present using this method are contemplating adopting worldwide combined reporting.

AMBASSADE DE BELGIQUE

The Embassy of Belgium presents its compliments to the Department of State and, on behalf of the Ten E.C. Governments, of which the Government of Belgium has now the presidency, it has the honor to forward the attached Note on the problems of the unitary method of taxation.

The Embassy of Belgium welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., June 29, 1982

ATTACHED: Note

THE DEPARTMENT OF STATE
WASHINGTON, D.C.

[SEAL]

UNITARY TAXATION

1. Our Governments refer to their Note on unitary taxation forwarded on their behalf to the Department of State on 30 October 1981 by Her Britannic Majesty's Embassy.

2. Our Governments remain firmly convinced that the unitary basis of taxation with combined reporting, particularly as applied in the international field, is entirely unsatisfactory.

3. As was pointed out in that Note, unless the same basic rules for calculating taxable profits are followed generally by the main trading nations it will be impossible to achieve the essential objective of providing a consistent and coherent international tax framework for trade and investment.

4. Our Governments wish to draw the attention of the State Department to the case of Container Corporation of America vs Franchise Tax Board which we understand is to be heard in the Supreme Court of the United States during the October Term 1982, and urge as a matter of high priority that the Government of the United States should participate in this case as amicus curiae.

BRITISH EMBASSY

Note No. 211

Her Britannic Majesty's Embassy present their compliments to the Department of State and, on behalf of the Ten EEC Governments, of which the British Government has now the Presidency, have the honour to forward the attached Note on the problems of the unitary method of taxation.

The British Embassy avail themselves of this opportunity to renew to the Department of State the assurances of their highest consideration.

30 October 1981

BRITISH EMBASSY
WASHINGTON

ATTACHED: Note.

UNITARY TAXATION

1. Our Governments are concerned about the application to US subsidiaries of foreign companies of the unitary basis of taxation as applied in California and in varying degrees by certain other States.

2. The unitary basis makes no attempt to examine the profits generated by the subsidiary. It looks to the total profits of the worldwide operations of the group of which the subsidiary is a part, and claims a portion of those profits on the basis of the assumption that certain specified factors, such as the fixed asset values, turnover and payroll, affect the profits of the subsidiary in the same way and to the same extent as the profits of the group as a whole, irrespective of where the corporations of the group operate. This means that, whenever the group as a whole makes a profit the subsidiary will be taxed on a portion of this profit, even if the subsidiary is actually making a loss, or in the reverse situation, that the subsidiary may not be taxed if the group as a whole has made a loss, although the subsidiary is actually in a profit making position.

3. This method is incompatible with the principles accepted by all OECD member states and recommended to all states as a basis for the taxation of subsidiaries or permanent establishments of foreign enterprises. These principles require that a subsidiary should be taxed only on the profits it actually has made, provided that these are based on dealing at "arm's length" between the subsidiary and related enterprises, i.e. that the transactions between the subsidiary and related corporations are on the same or on a comparable basis as transactions between wholly independent parties. This is intended to arrive at a fair measure of profit and rule out artificial pricing between members of the group for the sole purpose of minimizing tax liability.

4. Unless the same basic rules for calculating taxable profits are followed generally by the main trading nations it will be impossible to achieve the essential objective of providing a

consistent and coherent international tax framework for trade and investment.

5. The unitary tax basis can give rise to obviously inequitable tax liabilities, and to a form of double taxation which often cannot be relieved, or can be relieved only if countries, which follow generally accepted practices, bear an unfair burden of relief.

6. Unitary taxation, because it requires worldwide reporting of the group's activities in the state where the subsidiary operates, imposes very heavy compliance costs, in addition to the costs of compliance and reporting for non-US corporations in their "home countries".

7. The Federal Government uses the arms-length basis for its taxation of subsidiaries of foreign corporations.

8. The problem was addressed in the US/UK Double Taxation Treaty. Article 9(4) of the Treaty, which was supported by the Administration, would have disallowed the imposition of unitary taxes on subsidiaries of UK companies. When the Senate voted on the Treaty in 1978 the majority approved the Treaty with Article 9(4) in its original form, although the necessary two-thirds majority was not achieved. Subsequently, the Senate approved the Treaty with the necessary two-thirds majority, but subject to the reservation that Article 9(4) was not to apply for the purpose of state taxation. Article 9(4) remained in the Treaty, but only for the purpose of national taxation.

9. There are currently two relevant bills in Congress, S655 and HR 1983.

10. In view of the strong arguments against unitary taxation and the recent extension of its application in New York State, our Governments urge you to support this legislation in so far as it relates to the unitary tax issues raised above, with a view to early enactment.

Ambasciata D'Italia,
Washington, D.C., March 19, 1980

To the Department of State, Washington, D.C.:

The Italian Embassy presents its compliments to the Department of State and, on behalf of the Nine EEC Governments, of which the Italian Government has now the presidency, it has the honor to forward the attached Note on the problems of the unitary method of taxation.

The Italian Embassy welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

[SEAL]

PAOLA PANSA CEDRONIO,
Ambassador of Italy

1. Our Governments are concerned about the application to US subsidiaries of foreign companies of the unitary basis of taxation as applied in California and in varying degrees by certain other States.

2. The unitary basis makes no attempt to examine the profits generated by the subsidiary. It looks to the total profits of the worldwide operations of the group of which the subsidiary is a part, and claims a portion of those profits on the basis of the assumption that certain specified factors, such as the fixed asset values, turnover and payroll, affect the profits of the subsidiary in the same way and to the same extent as the profits of the group as a whole, irrespective of where the corporations of the group operate. This means that, whenever the group as a whole makes a profit the subsidiary will be taxed on a portion of this profit, even if the subsidiary is actually making a loss, or in the reverse situation, that the subsidiary may not be taxed if the group as a whole has made a loss, although the subsidiary is actually in a profit making position.

3. This method is incompatible with the principles accepted by all OECD member states and recommended to all states as a basis for the taxation of subsidiaries or permanent establishments of foreign enterprises. These principles require that a subsidiary should be taxed only on the profits it actually has made, provided that these are based on dealing at "arm's length" between the subsidiary and related enterprises, i.e. that the transactions between the subsidiary and related corporations are on the same or on a comparable basis as transactions between wholly independent parties. This is intended to arrive at a fair measure of profit and rule out artificial pricing between members of the group for the sole purpose of minimizing tax liability.

4. Unless the same basic rules for calculating taxable profits are followed generally by the main trading nations it will be impossible to achieve the essential objective of providing a consistent and coherent international tax framework for trade and investment.

5. The unitary tax basis can give rise to obviously inequitable tax liabilities, and to a form of double taxation which often cannot be relieved, or can be relieved only if countries, which follow generally accepted practices, bear an unfair burden of relief.

6. Unitary taxation, because it requires worldwide reporting of the group's activities in the state where the subsidiary operates imposes very heavy compliance costs, in addition to the costs of compliance and reporting for non-US corporations in their "home countries."

7. The Federal Government uses the arms-length basis for its taxation of subsidiaries of foreign corporations.

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9. There are currently four relevant bills in Congress. S 983, S 1688, HR 5093 and HR 5076, the last of which is scheduled for hearings on the 31st of March.

In the view of the strong arguments against unitary taxation, our Governments urge you to support this legislation in so far as it relates to the unitary tax issues raised above, with a view to early enactment.

Notes by the Kindgom of The Netherlands

Letter from the Ambassador to the Secretary of State

The Ambassador of the Netherlands presents his compliments to the Honorable the Secretary of State and has the honor to request Mr. Shultz's kind attention to the following:

In previous correspondence the Netherlands Government has presented to the Secretary of State its concerns about the "unitary" method of taxation that is being applied by the State of California to Shell Oil Company and Scallop Nuclear Inc., which are U.S. subsidiaries of Shell Petroleum N.V. ("SPNV"), a company of the Netherlands. In particular, the Netherlands Government objected to the State of California's applying its apportionment formula to the combined incomes of SPNV and its more than 900 subsidiaries and affiliates worldwide. The Netherlands Government expressed its view that this unitary tax approach, and the demands for information asserted in connection with it, are in conflict with the provisions of the Treaty of Friendship, Commerce and Navigation between the Netherlands and the United States of 1956 ("the Treaty"), and with general principles of international law.

In his note forwarded to the Netherlands Embassy on April 24, 1980, the Secretary of State advised that the Department of State would follow the case and would be pleased to consult with the Embassy at any opportune moment in the event that additional questions arose.

The Netherlands Government now wishes to bring to the attention of the Secretary of State important additional developments that seriously undermine the enforceability of the Treaty, in the tax area and other areas as well. On November 4, 1981, SPNV filed suit in the U.S. District Court for the Northern District of California challenging California's unitary approach on the grounds, among others, that it conflicts with the Treaty and with general principles of international law, and

also violates the Constitution of the United States. The Netherlands Government submitted a memorandum as *amicus curiae* stating its view that unitary taxation of a Netherlands-based multinational enterprise is in conflict with the Treaty and international law.

The district court did not consider the merits of SPNV's complaint or of the views presented by the Netherlands Government. Instead, on August 4, 1982, the court dismissed the complaint on the ground that, notwithstanding the articles of the Treaty on which SPNV relied, as a shareholder of its U.S. subsidiaries SPNV had no standing to challenge California's practice, and also on the ground that SPNV lacked standing to raise its constitutional claims. The court further held that the suit was unripe because defendants had not finally determined the amounts of tax due. A copy of the court's opinion is annexed.

SPNV appealed to the U.S. Court of Appeals for the Ninth Circuit. The Netherlands Government filed a brief *amicus curiae* in that court stating its view that the district court's ruling was based on a misreading of the Treaty. On June 30, 1983, the court of appeals affirmed the district court's decision on both standing and ripeness grounds. A copy of the appellate opinion is annexed.

The Netherlands Government is informed that SPNV will file a petition for certiorari in the Supreme Court, seeking review of the court of appeals' decision. The Netherlands Government intends to submit a brief as *amicus curiae* urging that certiorari be granted in light of the international importance of the issues presented.

The Netherlands Government believes that the court of appeals' decision denying the standing of SPNV, a Netherlands parent company, to invoke the Treaty may be even more damaging to the effectuation of the purposes of the Treaty than an adverse disposition on the merits would have been. The appellate court left undisturbed the district court's decision suggesting that a Netherlands company may invoke the

substantive protections of the Treaty in an American court only if it engages in trade or gainful pursuit within the United States through an unincorporated branch establishment, and not if it does so through a U.S. subsidiary corporation. That ruling imports into the relevant provisions of the Treaty a limitation they do not contain. Unless reversed by the Supreme Court, the lower court decisions will frustrate the Treaty's objectives by discriminating for standing purposes against the form of investment—local incorporation—that is most frequently used by both Netherlands and U.S. parent companies, and which is specifically provided for in the Treaty.

In addition, the court of appeals' interpretation of the Supreme Court's decision in *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982), unduly limits the applicability of the Treaty. In interpreting *Sumitomo* to mean that a Netherlands company can under no circumstances have greater rights than a U.S. corporation, irrespective of the provisions of the Treaty, the court of appeals' decision ignores the existence of separate treaty provisions granting most-favored-nation treatment and conferring independent substantive rights, with respect to taxation and other matters, on Netherlands companies engaged in trade or gainful pursuit in the United States.

Moreover, two of the treaty provisions under which SPNV was denied standing—Articles I(1) and VI(3)—are not limited to taxation but protect companies of one party with respect to any governmental conduct within the other. Therefore, the pernicious effects of the court's construction would not be limited to the area of taxation. If a similar interpretation of the Treaty were adopted by Netherlands tribunals, American companies that established subsidiaries in the Netherlands, and the subsidiaries themselves, would lose the right to invoke the Treaty's protections against unreasonable or discriminatory treatment in taxation and many other areas. As a result, important provisions of the Treaty would be almost entirely vitiated.

In his note of April 24, 1980, the Secretary of State indicated his presumption that the legal issues relating to the permissibility of the State of California's unitary tax method would be decided by U.S. courts of competent jurisdiction. The court of appeals has rendered that presumption false by denying a Netherlands company the right even to present for adjudication the issue of the compatibility of California's practice with the Treaty. And the State of California and the lower courts interpret *Sumitomo* to preclude U.S. subsidiaries from presenting claims based on the Treaty, because the subsidiaries are not "companies of" their foreign parent's domicile.

The court's additional ruling that the controversy is unripe, will, if allowed to stand, further impair the Treaty. The court indicated that federal judicial consideration of the Treaty issues should await completion of state tax proceedings in California. However, SPNV is not entitled to participate in those proceedings, and the State of California takes the position that the U.S. subsidiaries have no standing to assert rights under the Treaty in those proceedings. Therefore, the state proceedings do not offer a means of vindicating the rights SPNV seeks to assert under the Treaty. To deny prompt adjudication of the Treaty issues is especially inappropriate where unitary taxation by California and other States has aroused vigorous protests from the Netherlands and other foreign governments, thus disturbing U.S. foreign relations. *See Container Corp. v. Franchise Tax Bd.*, No. 81-523, slip op. at 6-7 n.4 (June 27, 1983) (Powell, J., dissenting). In *Container*, the three dissenting justices expressly stated that the constitutionality of California's unitary tax formula could not be defended as applied to a foreign-based multinational. The five majority justices expressly left this point open when they held the tax constitutional as applied to a U.S.-based multinational. The lower court decisions in *SPNV*, however, bar SPNV from raising either its constitutional claims or its treaty claims.

In the light of these developments, the Netherlands Government strongly urges the U.S. Government to support SPNV's petition for certiorari, and to express to the Supreme Court its views on the aspects of both standing and ripeness. Not only will this help to avoid the confusion that arose from the silence of the U.S. Government in the case of Container Corporation before the Supreme Court, but also the opinion of both States parties to the treaty on the question of the ius standi may well be of great value to the Supreme Court.

The Ambassador of the Netherlands avails himself of this opportunity to renew to the Secretary of State the assurances of his highest consideration.

Washington, D.C.
September 15, 1983

Letter from the Minister of Finance to the Secretary of the Treasury

MINISTER
VAN
FINANCIEN
No. 083-2055

The Honorable Donald T. Regan
Secretary to the Treasury
Washington, D.C. 20220
United States of America

Dear Mr. Regan,

I am writing you on the subject of unitary taxation. Recently the United States Supreme Court delivered its decision in the case of Container Corporation of America v. The California Franchise Tax Board, upholding the right of a state to use worldwide formula apportionment to internationally operating companies.

The decision of the Supreme Court was received with dismay in my country. The method of unitary taxation inevitably leads to double taxation and entails an unduly heavy administrative burden especially for foreign enterprises holding U.S. companies. has been mentioned to me that a severe budgetary loss for the states concerned would arise if worldwide apportionment were to be abolished and arm's length taxation restored. It should be borne in mind however that this implicitly means that a major part of that amount represents double taxation. Unitary taxation neglects differences in economic circumstances and adds together the results of different activities which almost certainly will have different degrees of profitability. Furthermore this method apportions part of the worldwide profit of an enterprise to a state even if the activities in that state have only produced losses. A striking example of this situation is at hand in the case of Shell Petroleum N.V. v. Mary Ann Graves (The California Franchise Tax Board) where a profit of about $40 million is apportioned to a U.S.

subsidiary engaged in non-oil related business, whereas that subsidiary has accumulated a loss of about $390 million over the taxable years concerned.

I would like to draw your attention to another consideration. The matter of unitary taxation has gained much attention among tax authorities throughout the world.

I fear that it is very tempting especially for less developed and other countries in urgent need of revenue to follow the Californian example and adopt this method which only requires the application of a simple formula to worldwide figures of multinational enterprises.

For the Netherlands Government the issue of unitary taxation has been of great concern for a considerable period of time as you may be aware. During the negotiations on the revision of the double taxation convention between our countries it has repeatedly been stressed that it is an anomaly to discuss the matter of avoidance of double taxation when—as a result of the unitary method—double taxation remains an inevitable consequence of operating a business within the territory of the partner to the convention.

Finally, Mr. Secretary, the Netherlands has for a long time had the impression that the Federal Government of the United States shares its concerns about the effects of unitary taxation. The filing of an amicus curiae brief by the U.S. Govenment in the case of Chicago Bridge and Iron v. Caterpillar was viewed in that light.

However, no brief of amicus curiae was filed in the Container case. Now that the U.S. Government, as I understand, is considering its position towards the use of unitary taxation by states, I would urgently request you to take, or to support, any initiative which may put an end to this impediment to international trade.

Yours sincerely,

H. O. RUDING

August 17, 1983

Telegram from the Minister of Finance to the Secretary of the Treasury

The Honorable Donald T. Regan

Further to my letter of August 17, 1983, concerning the use of formula apportionment in the levying of state income taxes I would like to clarify the views of the Netherlands Government with respect to the possible solutions of the problem.

In its decision in Container Corporation of America v. Franchise Tax Board upholding the constitutionality of unitary taxation of a U.S. company and its foreign subsidiaries, the Supreme Court reserved its position on the application of formula apportionment to U.S. companies with foreign parents. This reservation might be seen as presenting a rather simple solution in the form of a limitation of the use of formula apportionment to cases of U.S. owned companies.

The Netherlands Government would deeply deplore a decision of the United States Governement to take that direction. Although a limitation on the use of formula apportionment to cases of U.S. owned companies would solve most problems encountered by Netherlands companies, such a course would entail another great danger.

Exclusion from unitary taxation of only the so-called inbound investment situations results in different fiscal regimes applying to foreign investment in the U.S. and U.S. investment overseas. Foreign investment within the U.S. would then only attract taxation with respect to the income from activities within the U.S., whereas a U.S. Company investing abroad could be taxed not only on its income from activities within the U.S. but also on a part of the profits made by its foreign subsidiaries.

Together with the cost of compliance these facts tend to diminish the attractiveness of foreign investment for U.S. companies and thus to impede the growth of international

economic relations. As a consequence there is in our view a very real danger of withdrawal of U.S. investment from foreign countries.

The Netherlands Government wishes to draw the attention of the U.S. Government to these highly adverse effects of a possible course of action which in other aspects seem attractive. In particular the mutual involvement in our two economies would be harmfully affected.

With respect to unitary taxation this development has not yet materialized. The same tendency is, however, becoming apparent in the provisions of the Tax Equity and Fiscal Responsibility Act relating to the taxation of income from other than extraction activities. On this subject I will shortly send you a memorandum stating the views of the Netherlands Government.

Concluding, Mr. Secretary, the Netherlands Government reiterates its objections against the unitary method of taxation in international situations. Whatever the character of the business may be, where there is no unity of economic circumstances unitary taxation is bound to distort taxable income of business operating in such circumstances. My government strongly believes that unitary taxation must be banned from the area of internationally operating business.

H. O. Ruding

September 12, 1983

Letter from the Charge d'Affaires to the Secretary of State

The Charge d'Affaires a.i. of the Netherlands presents his compliments to the Honorable the Secretary of State and has the honor to request Mr. Vance's kind attention for the following matter.

The Authorities in the Netherlands have received a complaint by the Royal Dutch Shell Company with regard to certain practices of the Franchise Tax Board of the State of California (See Annex). An analysis of the complaint convinced the Netherlands Government that these practices indeed are contrary to the provisions of the Treaty of Friendship, Commerce and Navigation between the Netherlands and the United States of 1956 and to the accepted principles of general international law.

It would be highly appreciated if the Secretary could have this matter investigated and inform the Charge d'Affaires a.i. on the results of His findings.

Washington D.C.
September 18, 1979

[SEAL]

I. COMPLAINTS

It is the conviction of the Netherlands Government that on account of the method of taxation by the State of California and the requirements imposed in connection therewith on the American corporations Shell Oil Company and Scallop Nuclear Inc. based on the "unity of business", assumed by the California Franchise Tax Board (FTB) to exist between the above mentioned corporations and the entire Royal Dutch/Shell Group, the Netherlands members of this Group, notably Royal Dutch Petroleum Corporation and Shell Petroleum NV, are treated in contravention with the provisions of the Treaty of Friendship, Commerce and Navigation between the Netherlands and the United States of 1956 as well as contrary to general international law.

II. THE FACTS

Shell Oil Company, a Delaware corporation, is owned for about 70% by Shell Petroleum NV, a Netherlands company; Scallop Nuclear Inc., also a Delaware corporation, is 100% owned by Shell Petroleum NV. Both Shell Oil and Scallop pursue certain activities in California and are assessed for the California Franchise Tax.

On the basis of the "unity of business" which the Franchise Tax Board (FTB) assumes to exist between Shell Oil and Scallop on the one hand and other companies of the Royal Dutch/Shell Group on the other hand, the first two companies are being assessed for that share of the worldwide profit of the Royal Dutch/Shell Group that, according to California legislation, in case of unity can be apportioned to them. Although Shell Oil denies unity with the other companies of the Royal Dutch/Shell Group, the FTB maintains that an integrated oil company is unitary by definition. The reasons for assuming unity between the Royal Dutch/Shell Group and Scallop are unclear because Scallop is the only company of the Shell Group engaged in nuclear energy activities. The FTB asked Shell Oil

for the purpose of unitary assessment information about all companies that are owned for 50% or more by the Group. This information which was not available to Shell Oil itself, concerned more than 900 companies; requested were *inter alia* the financial accounts of the entire Group over the years 1967-1972, to be presented in accordance with American financial standards and in dollar figures. If the information would not be deemed satisfactory by the FTB this would lead to the imposition of a 25% fine.

Only after Shell Oil would have provided the required information the FTB would be prepared to reconsider its assumption of unity or a revision of the assessment.

Further judicial recourse in the State of California or at the Federal level is not possible until after payment of the contested assessments.

III. INCOMPATABILITY WITH INTERNATIONAL LAW

A. Treaty of Friendship, Commerce and Navigation between the Netherlands and the United States of 1956.

Under Article I, paragraph I, "Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests". The complaint of the Netherlands Government concerns the treatment by the State of California of Shell Oil Company, a Delaware corporation, of which more than 69% of the shares are owned by Shell Petroleum NV, a company incorporated under Netherlands law and established in the Netherlands, which in turn is a subsidiary holding company of the NV Koninklijke Nederlandse Petroleum Maatschappij (Royal Dutch Petroleum Company), also a company incorporated under Netherlands law and established in the Netherlands; the complaint also concerns the treatment of Scallop Nuclear Inc., a Delaware corporation fully owned by Shell Petroleum NV. The Netherlands Government is of the opinion that both Scallop Nuclear Inc. and Shell Oil Company

are to be considered a property or an enterprise of a Netherlands company.

It is the view of the Netherlands Government that the levying of taxes on Shell Oil Company and on Scallop Nuclear Inc. by the State of California on the basis of the California FTB's assumption of "unity of business" with the other companies of the Royal Dutch/Shell Group, is neither fair nor equitable.

The Netherlands Government does not want, nor is it in a position, to discuss the question whether according to Californian legislation "unity of business" indeed exists. It is, however, of the opinion that apportionment of the profit of the entire Royal Dutch/Shell Group in accordance with California legislation is in violation of the obligations resulting from Article I, paragraph I of the Treaty of Friendship, Commerce and Navigation of 1956. This opinion is based on the fact that Californian State law apportions to Shell Oil and Scallop profit which bears the same proportion to the profits of the entire Royal Dutch/Shell Group as the properties, sales and payroll of the said companies in California bear to the properties, sales and payroll of the entire Royal Dutch/Shell Group. The results of an apportionment of such a kind can only correspond with the profits actually made, when the effect of the above-mentioned factors on the profitability of a business is the same all over the world. While it might perhaps be assumed that for the entire territory of the United States this effect is the same, it is an established fact that this does not apply to all areas in the world where the Royal Dutch/Shell Group is operating. Thus the apportionment of the profit of a corporation with worldwide activities on the basis of one single formula cannot be considered a fair and equitable treatment.

The Netherlands Government considers the unitary taxation of Shell Oil and Scallop by the State of California an unresonable measure in contravention of Article IV, section 3 of the Treaty of Friendship, Commerce and Navigation of 1956, because unitary taxation and apportionment of profit on that

basis are in contravention of the generally accepted principle that companies associated with companies in an other country should be assessed in the country where their effective management is situated and only for the profit that they have actually made in that country, unless in the commercial or financial relations between the enterprises conditions are made or imposed which differ from those which would have been made between independent enterprises.

In OECD of which both the United States and the Netherlands are members, this principle which usually is referred to as "the arm's length principle" is generally accepted as the standard for the calculation of the taxable profit of associated enterprises (notably in Article 9 of the OECD Model Double Taxation Convention on Income and on Capital of 1977). Neither the Netherlands nor the United States have made any reservation in the acceptance of this standard. The United States have even declared that in their opinion the "arm's length standard" should not only apply to related enterprises but to all related persons and to all sources of income.

The Governments of the OECD memberstates, in their "Declaration of June 21, 1976, on International Investment and Multinational Enterprises", have declared to be of the opinion that enterprises should refrain from making use of particular facilities available to them, such as transfer pricing which does not conform to an "arm's length standard" for modifying in ways contrary to national laws the tax base on which members of the Group are assessed. The United Nations Expert Group on tax treaties between developed and developing countries also holds the opinion that the "arm's length standard" should apply to the calculation of taxable profit of related companies.

On all of the above mentioned occasions both the United States and the Netherlands have accepted the principle that related companies should be taxed on the basis of actual results unless the latter would deviate from results that would have been achieved if relations between the enterprises were based

on an "arm's length standard". Unitary taxation as practised by the State of California obviously violates those principles.

The unreasonable character of the California tax legislation clearly shows in the case of Scallop Nuclear Inc. This company had suffered accumulated losses amounting to $390,000,000 by the end of 1976, whereas application of the California apportionment formula would lead to an apportionment to Scallop of a profit of $60,000,000.

The former Secretary of the Treasury, Mr. Blumenthal, also doubted the fairness and reasonableness of unitary taxation in his letter of July 10, 1977, to the California Franchise Tax Board, in which he stated:

"Though you state that unitary apportionment is the most accurate and reasonable method yet devised for assessing the income of one element in a multinational Group, it is our experience, as well as that of most other countries, that the determination of income on the basis of an arm's length standard is not only accurate but also far less arbitrary. The arm's length standard is the internationally accepted approach. Thus, in an international context, the use of another method by one jurisdiction will often lead to double taxation. The unitary system imposes a substantial compliance burden on multinational corporations. Much of the information required for a combined report with respect to a foreign parent or foreign sister corporation may not be available to the taxpaper. Even where the information is available the burden of reporting the accounts of many far-flung affiliates on a standardized basis can be great. We are aware of cases where this burden has discouraged foreign investment in the United States".

The aforementioned arguments apply regardless of the question whether there in fact is a "unity of business" between Shell Oil Company and Scallop Nuclear Inc. on the one hand and Shell Petroleum NV and the Royal Dutch/Shell Group on the other hand. If it would be assumed that the "unity of business" does indeed exist as stated by the FTB, taxation on

the basis of apportionment according to California legislation is, in the opinion of the Netherlands Government, in contravention of Article XI, par. 4 of the Treaty of Friendship, Commerce and Navigation of 1956. This Article prohibits the States concerned to tax a company of one Party engaged in trade or other gainful pursuit within the territories of another Party, in excess of what is allocable or apportionable to its territories. As indicated above in the case of a company with worldwide activities, unitary apportionment can only accidentally lead to results that correspond with reality.

Therefore the Netherlands Government is of the opinion that unitary taxation cannot be considered a taxation of only that profit that is reasonably allocable to the State of California.

B. General International Law

The demands by the California Franchise Tax Board, through Shell Oil, for data that can only be supplied by the other companies of the Royal Dutch/Shell Group incorporated in foreign countries all over the world—and the imposition of a fine of 25% in case of non-compliance—amount to a form of extra-territorial application of national legislation that is unacceptable to the Netherlands Government, because it contravenes well-established principles of international law. The California Board has no jurisdiction on this issue over the Netherlands companies Royal Dutch Petroleum Corporation and Shell Petroleum NV and it cannot lawfully compell them to supply the required data. International law, as evidenced by the general practice of States to date, does not permit a State to assume or exercise prescriptive jurisdiction over the conduct of an alien which occurs within the territory of another State or States solely on the basis that such conduct produces "effects" or repercussions within its territory.

Note by the United Kingdom

BRITISH EMBASSY
3100 Massachusetts Avenue, N.W.
Washington, D.C. 20008
Telephone: (202) 462-1340

17 December 1981

The Honorable Donald T. Regan
Secretary of the Treasury
Department of the Treasury
Room 3326
Main Treasury Building
15th & Pennsylvania Avenue N.W.
Washington, D.C.

Dear Mr. Secretary,

UNITARY TAXATION

I have been asked to deliver to you the attached text of a letter from the Chancellor of the Exchequer of the United Kingdom, on the subject of unitary taxation as it arises in the United States Supreme Court case between Chicago Bridge and Iron Company and Caterpillar Tractor Company/Illinois Department of Revenue.

The top signed copy will follow in a day or so.

Yours sincerely,

/s/ Harry G. Walsh
H. G. WALSH
Counsellor (Economic)

ATTACHED: TEXT.

Letter from the Rt. Hon. Sir Geoffrey Howe, Q.C. M.P., Chancellor of the Exchequer. to The Honorable Donald T. Regan, Secretary of the Treasury.

UNITARY TAXATION

As I mentioned when I saw you on 28 September, the United Kingdom is much concerned about the use of the unitary basis of taxation which is being increasingly adopted by individual US States. The problem is that, while business profits earned outside the US by a UK company operating or having affiliates in the US are not subject to US Federal Tax under our tax treaty, they are subject to taxation in some States. We have in the past requested the US Treasury to take action at the Federal level to remedy this unsatisfactory situation.

It has come to my attention that the Supreme Court has now chosen to hear a case (Chicago Bridge and Iron Company versus Caterpillar Tractor Company/Illinois Department of Revenue) which involves the issue of whether the worldwide combined basis applied at State level is acceptable as a method of company taxation under the US Constitution. While I do not presume to anticipate the Court's eventual decision, this case seems to provide an early opportunity for it to curb the use of the worldwide combined basis for taxing company profits. The continuation of this practice would seem to conflict with the ability of the US Government to speak with one voice on international issues, a requirement which has already been clearly recognised by the Court in the 1979 Japan Line case.

Taxpayers in our two countries, who are potentially subject to both US and UK taxation, receive substantial benefits under our double taxation agreement. This provides for a fair and symmetrical method of attribution of company profits, as between our respective national jurisdiction, to avoid the risk of double taxation of the same income. The benefits of the Treaty are now being reduced, and the risk of double taxation increased, because some American States do not adhere to the method of attribution agreed at national level for the benefit of our business taxpayers.

I understand that you intend to find a means to put before the Court the US Treasury view that the worldwide combined basis is an arbitrary method of attributing profits, which involves excessive compliance costs for foreign multinational companies established in those states where it is used. It also introduces an undesirably asymmetric element into the tax relationship between our two countries, since the unitary basis of taxation with worldwide combined reporting is not used by the UK at any level of government. This imbalance is causing increasing concern, not only on the part of British companies which have made representations about it, but in Parliament where Questions have been asked. My purpose in writing is to assure you that you have the firm support of the UK Government in putting forward the US Treasury view in this case.

Note by Japan

Embassy of Japan
Washington
August 11, 1983

Aide-Memoire

Re: THE UNITARY TAX SYSTEM

The Government of Japan wishes to present to the U.S. Government agencies concerned the following views with regard to the Unitary Tax System.

The Unitary Tax System, which has been introduced in California and many other states of the U.S., has put a serious burden and constraint on the management and business activities of Japanese-affiliated companies operating in the U.S. We regard the Unitary Tax System as having the following problems:

—It has been causing international double taxation.

—It requires financial and other documents from the companies concerned, which include not only those of the parent company, but of other affiliated companies all over the world, and thus has imposed a tremendous burden on them.

—It has a discouraging effect on Japanese investment in the U.S., and hampers the sincere efforts by the U.S. and Japanese Governments to actively promote Japan-U.S. investment.

Based on this recognition, the Japanese Government has taken every opportunity to raise this question in such fora as the Japan-U.S. sub-cabinet level meeting and Japan-U.S. Trade Subcommittee, and requested the U.S. Government to take appropriate measures as soon as possible to abolish the Unitary Tax System.

On June 27th, the U.S. Supreme Court decided in the Container Corp. of America *vs* Franchise Tax Board Case, that the Unitary Tax System based upon the world-wide profits of the company concerned, including those of the overseas affiliated companies, is constitutional. Although the Court decision was not on a case in which the head office is located abroad, we are concerned that the decision would encourage a number of states to newly introduce the Unitary Tax System or discourage the states which already have the System from abolishing it. We wish to reiterate that Unitary Taxation can be a barrier to the expansion and development of Japan-U.S. economic relations including the promotion of our direct investment.

The Government of Japan, attaching great importance to the U.S. Supreme Court decision of June 27th, again expressed concern over this matter in the Japan-U.S. Trade Subcommittee meeting held this July at Wye Plantation, Maryland. We were encouraged to hear the U.S. Government explain that it is ready to present an amicus curiae brief in cases where diplomatic implication is involved. The Government of Japan strongly wishes that the U.S. Government will support the motion for rehearing, present the amicus curiae brief in connection with the rehearing of this case, and also take the same appropriate measures in connection with other individual cases. The Government of Japan further requests that the U.S. Government take concrete measures as soon as possible, including possible legislative actions, which will lead to the abolition of the Unitary Tax System.

Notes by Canada

Canadian Embassy — Ambassade du Canada

1746 Massachusetts Avenue N.W.
Washington, D.C. 20036-1985

23 August 1983

The Honourable James A. Baker III
Chief of Staff and Assistant to
the President
The White House
Washington, D.C. 20500

Dear Mr. Baker,

I am writing to you to flag the Canadian Government's concern regarding the unitary tax issue.

In the recent case of Container Corporation vs the California Franchise Tax Board, the United States Supreme Court upheld the ability of a state government to levy taxes based on the worldwide earnings of multi-national corporations. This method of taxation is inappropriate in the view of the Canadian Government because it places business corporations in the position of potentially having to pay tax in one jurisdiction for profits earned (and taxed) elsewhere. In addition to being contrary to good business practice, it constitutes an unnecessary and unfortunate intervention into taxing areas which should belong to the jurisdiction in which a corporation is actually doing business.

The Canadian Government view, which is expressed in the attached copy of a letter to Secretary Regan from Marc Lalonde (the Canadian Finance Minister) is that the United States should take appropriate steps to have state governments

drop the unitary method of taxation before it grows to become a major stumbling block to international business and a serious foreign relations problem.

We have, of course, made our views known to several of the members of the Cabinet Council on Economic Affairs interagency working group which is developing an Administration position on this matter. However, I wanted to reinforce the seriousness which we attach to this issue by also drawing it to your attention.

Yours sincerely,

ALLAN GOTLIEB
Ambassador

Canadian Embassy

Ambassade du Canada

1746 Massachusetts Ave, N.W.
Washington, D.C. 20036-1985

11 August 1983

The Honourable Donald T. Regan
Secretary of the Treasury
Room 3330
Department of Treasury
Washington, D.C. 20220

Dear Mr. Secretary,

I have been asked to transmit to you the enclosed letter from The Honourable Marc Lalonde, Minister of Finance for Canada, stating Canada's concerns about the unitary method of taxation now being employed by a number of states in this country.

Yours sincerely,

ALLAN GOTLIEB
Ambassador

Minister of Finance | Ministre des Finances

Ottawa, Canada
K1A 0G5

The Honourable Donald T. Regan
Secretary to the Treasury
Washington, D.C.
U.S.A. 20220

Dear Mr. Secretary:

I have recently had drawn to my attention the decision in the case of Container Corporation of America vs the California Franchise Tax Board in which the United States Supreme Court upheld the right of a state to use the unitary method of taxing corporate income.

The unitary method of taxation is a cause of considerable concern to a number of Canadian-based multi-national corporations. Their concern arises out of three main considerations. First, the unitary method, by applying an arbitrary allocation formula to the consolidated world earnings of a corporate group, departs from the generally accepted international norm for determining the geographic source of income for tax purposes and gives rise to a serious potential for double taxation. Second, the costs of compliance arising out of the need to prepare consolidated returns that conform to the state tax accounting requirements are particularly onerous for Canadian and other foreign-based companies. Third, there is a concern that the sanction of the unitary method will result in its adoption by an increasing number of states and, possibly, by certain foreign countries as a means of increasing their tax revenues.

I understand that you have indicated recently that you were giving consideration to possible legislative initiatives as a result of the Supreme Court decision. I recognize that the issues involved are both complex and sensitive, but the application of the unitary method of taxation to the foreign source income of non-U.S. companies poses difficult problems for a large segment of the international business community. My purpose in writing is to emphasize the seriousness of those problems and to encourage you to give urgent consideration to the ways in which they might be resolved.

With all good wishes and kind regards.

Sincerely,

Marc Lalonde

COMPANIES IN WHICH ROYAL DUTCH PETROLEUM COMPANY AND THE "SHELL" TRANSPORT AND TRADING COMPANY, P.L.C., HOLD EQUITY INTERESTS

The following is a list of those companies in which Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, p.l.c., directly or indirectly, hold equity interests. The interests shown are held through either Shell Petroleum N.V. or The Shell Petroleum Company Limited or both. The percentages shown represent both direct and indirect holdings of ordinary shares in the companies named, in some cases rounded to the nearest whole figure. Except in the case of the United States, subsidiaries of the companies named are not generally shown separately. Use of an asterisk preceding the name of a company in the list indicates that it is a partnership rather than a corporation.

UNITED STATES:

Name of Company	State of Incorporation	Percentage Holding
Artelonics Corporation		79
*DCS Capital Partnership	Delaware	26
DCS Capital Corporation	Delaware	26
1973 Nuclear Corporation	Delaware	100
*Ocean Minerals Company		31
Ocean Minerals Incorporated	Delaware	49
Refineria Petrolera de Guatemala	California	40
Salmon Enterprises, Incorporated		79
Salmon Pipelines Limited		79
Salmon Resources Limited		79
Scallop Coal Corporation	Delaware	100
Justin Coal Corporation	Delaware	100
*Massey Coal Company	Delaware	50
A.T. Massey Coal Company, Inc.	Virginia	50
A.T.M. Inc.	Kentucky	50
Allburn Coal Company, Inc.	Kentucky	50
Alpine Development Company	West Virginia	50
Anchor Coal Company, Inc.	Colorado	50
Ben Creek Coal Company	West Virginia	50
Big Bear Mining Company	West Virginia	50
Big Beaver Coal Co.	West Virginia	50

Name of Company	State of Incorporation	Percentage Holding
Big Bottom Coal Company	Kentucky	50
Bishop Mine Development Co.	West Virginia	50
Black Castle Mine Development Co.	West Virginia	50
Black King Mine Development Co.	West Virginia	50
Black Knight Mine Development Co.	West Virginia	50
Blackberry Creek Coal Company	Kentucky	50
Blueco Sales & Processing Co.	West Virginia	10
Bluesprings Coal Company	West Virginia	50
Bonnie Coal Company, Inc.	West Virginia	50
Capstan Mining Company	Colorado	50
Central West Virginia Energy Company	West Virginia	50
Chess Processing Company	West Virginia	50
Chestnut Coal Company	Tennessee	30
Clark Elkhorn Coal Company, Incorporated	Kentucky	50
Cline & Chambers Coal Company, Inc.	Kentucky	50
Coal Transit Company	Tennessee	50
*Comco	Virginia	17
Crystal Alma Corporation	West Virginia	50
Dehue Coal Corporation	West Virginia	50
Douglas Pocahontas Coal Corporation	West Virginia	50
East Kentucky Energy Corporation	Kentucky	50
Elk Run Coal Company, Inc.	West Virginia	50
*Elton Coal Company	Pennsylvania	25
Federal Development Corporation	West Virginia	50
Grundy Mining Company, Inc.	Tennessee	50
Hopkins Creek Coal Company	Kentucky	50
Imec, Inc.	Kentucky	50
Joboner Coal Company	Kentucky	50
Kermit Coal Company	West Virginia	50
Knight Mine Development Co.	West Virginia	50
LaBelle Processing Company	Pennsylvania	50
Leslie Coal Company, Inc.	West Virginia	50
Lewco Development Company	West Virginia	50
Lobata Coal Company	West Virginia	50

Name of Company	State of Incorporation	Percentage Holding
*M & B Coal Company	West Virginia	50
Mansfield Carbon Products, Inc.	Delaware	50
Marrowbone Development Company	West Virginia	50
Martin County Coal Corporation	Kentucky	10
Massey Coal Export Corporation	Virginia	50
Massey Coal Sales Company, Inc.	Virginia	50
Massey Coal Services, Inc.	West Virginia	50
Massey Coal Terminal, S.C. Corporation	South Carolina	50
Massey Coal Terminal Corporation	Virginia	50
Massey Disc Corporation	Virginia	50
Massey Fuels Corporation	Virginia	50
Massey Stores, Inc.	Virginia	50
Maxann Coal Corp.	West Virginia	50
Menefee Land Company, Inc.	Colorado	50
*Midlowthian Company	Pennsylvania	25
Micco Corporation	West Virginia	50
Omar Mining Company	West Virginia	50
Ora Mae Coal Company, Inc.	Kentucky	50
P.M. Charles Coal Co.	West Virginia	50
Peerless Eagle Coal Company	West Virginia	50
Pennsylvania Mine Services, Inc.	Pennsylvania	50
Peter Cave Coal Company, Incorporated	Kentucky	50
Pikco Mining Company	West Virginia	50
Pike County Coal Corporation	Kentucky	50
Piney Creek Coal Company	West Virginia	50
Pocahontas Red Ash Mining Company	West Virginia	10
Pond Creek Mining Co.	West Virginia	50
Raleigh Six Coal Company	West Virginia	50
Ratliff Elkhorn Coal Co.	Kentucky	50
Rawl Sales & Processing Co.	West Virginia	50
Reitz Coal Co.	Pennsylvania	25
Reitz Corporation	Pennsylvania	50
Remington Fuels, Inc.	West Virginia	50

Name of Company	State of Incorporation	Percentage Holding
Robinson-Phillips Coal Company	West Virginia	50
Rocky Hollow Coal Co.	West Virginia	50
Rose Branch Development Company	West Virginia	10
Royalty Smokeless Coal Company	West Virginia	50
Russell Fork Coal Company	West Virginia	50
SC Coal Corporation	Delaware	50
SC Ventures Inc.	Delaware	50
*Sackett Mining Company	Colorado	50
Shannon-Pocahontas Coal Corporation	West Virginia	100
*Shannon-Pocahontas Mining Company	West Virginia	80
Shipyard River Terminal, Inc.	South Carolina	50
Simron Fuel Company, Inc.	West Virginia	50
Sprouse Creek Processing Company	West Virginia	50
Sun Coal Company Inc.	Colorado	50
Sycamore Mining Co.	West Virginia	50
T. W. Associates, Inc.	West Virginia	50
T. C. C. International, Inc.	Tennessee	50
T. C. H. Coal Company	Kentucky	50
Tall Timber Coal Co.	Kentucky	50
Tennessee Consolidated Coal Company	Delaware	50
Town Creek Coal Company	West Virginia	50
*Tug River Coal Company, Inc.	West Virginia	50
Utility Coals, Inc.	West Virginia	50
Vesta Mining Company	Pennsylvania	50
Virginia Crews Coal Company	West Virginia	10
Virginia Mining Co., Inc.	Tennessee	50
Walnut Coal Company, Inc.	Tennessee	30
West Fork Fuel Company	West Virginia	50
Whitwell Coal Corporation	Delaware	50
Winston Coal Company	West Virginia	50
Wolf Creek Collieries Company	Kentucky	50
Wyomac Coal Company, Inc.	West Virginia	50
Scallop Development Inc.	Delaware	100
Billiton Alaska Exploration Inc.	Delaware	100
Billiton Exploration U.S.A, Inc.	Delaware	100

Name of Company	State of Incorporation	Percentage Holding
Billiton Minnesota Exploration Inc.	Delaware	100
Billiton Polaris Inc.	Delaware	100
Billiton Supply Inc.	Delaware	100
Pavement Consultancy Services Inc.	Delaware	100
Scallop Holding Incorporated	Delaware	100
AP Shipping Corporation	Liberia	100
Argus Realty Services, Inc.	Delaware	100
Asiatic Petroleum Corporation	Delaware	100
Billiton Metals Inc.	Delaware	100
Billiton Commodities Inc.	Delaware	100
*Conch L.N.G.	New Jersey	40
Greater New York Terminal Inc.	New York	100
Houston Fuel Oil Terminal Inc.	Texas	100
*Houston Fuel Oil Terminal Company	Texas	50
North American Plant Breeders	Connecticut	100
OPB, Inc.	Delaware	100
Reserve Terminal Corporation	New Jersey	50
Royal Lubricants Company, Inc.	Delaware	100
Scallop Corporation	Delaware	100
Scallop Liquefied Natural Gas, Inc.	Delaware	100
Scallop Nickerson Plant Breeders, Inc.	Delaware	100
Scallop Nuclear Inc.	Delaware	100
*Valley Pines Associates	California	50
*Allied-General Nuclear Services		25
Scallop Thermal Management, Inc.	Delaware	100
*Steuart/STM Associates	D.C.	50
Second Reserve Terminal, Inc.	New Jersey	50
Tanker Owners, S.A.	Panama	100
Scotlene, Inc.	Delaware	79
Shell Funding Corporation	New York	100
Shell Oil Company	Delaware	69
Applied BioSciences Inc.	Delaware	69
Bellaire Trucking Company	Delaware	69
Belridge Farms	California	69
Belridge Oil Company	California	69
Belridge Packing Company	California	69
Blue Dolphin Pipeline Company	Delaware	69
Bullenbay Marine Services N.V.	Netherlands Antilles	23

Name of Company	State of Incorporation	Percentage Holding
Burrwood Gathering Company	Delaware	69
Butte Pipe Line Company	Delaware	35
Chaparro Gathering Company	Delaware	69
Choctaw Pipeline Company	Delaware	69
Compania Shell de Exploracion de Colombia	Delaware	69
Cortez Pipeline Co.		69
Dixie Pipe Line Company		4
Explorer Pipeline Co.		18
IND/AG Chemicals, Inc.	California	69
Inland Corporation		17
International Lubricant Corp.		69
LOCAP, Inc.		7
LOOP, Inc.		14
Olympic Pipe Line Co.		30
Pecten Arabian Limited	Bermuda	69
Pecten Arabian Services		69
Pecten Bahamas Company	Delaware	69
Pecten Belize Company	Delaware	69
Pecten Brazil Alagoas Company	Delaware	69
Pecten Brazil Alagoas Petroleum Company	Delaware	69
Pecten Brazil Amazon Company	Delaware	69
Pecten Brazil Amazon Exploration Company	Delaware	69
Pecten Brazil Amazon Exploration and Development Company	Delaware	69
Pecten Brazil Amazon Petroleum Company	Delaware	69
Pecten Brazil Bahia Company	Delaware	69
Pecten Brazil Bahia Exploration Company	Delaware	69
Pecten Brazil Bahia Exploration and Development Company	Delaware	69
Pecten Brazil Bahia Petroleum Company	Delaware	69
Pecten Brazil Exploration Company	Delaware	69
Pecten Brazil Exploration and Development Company	Delaware	69
Pecten Brazil Maranhao Company	Delaware	69
Pecten Brazil Maranhao Exploration Company	Delaware	69
Pecten Brazil Para Petroleum Company	Delaware	69
Pecten Brazil Petroleum Company	Delaware	69

Name of Company	State of Incorporation	Percentage Holding
Pecten Brazil Rio Grande Do Norte Company	Delaware	69
Pecten Cameroon Company	Delaware	57
Pecten Cameroon LNG Limited	Bermuda	69
Pecten Chemicals, Inc.	Delaware	69
Pecten Coal International, Inc.	Delaware	69
Pecten Curacao N.V.	Netherlands Antilles	
Pecten Egypt Petroleum Company	Delaware	69
Pecten Equatorial Guinea Company	Delaware	69
Pecten International Company	Delaware	69
Pecten Limited	Bermuda	69
Pecten Malaysia Company	Delaware	69
Pecten Middle East Services Company	Delaware	69
Pecten Orient Company	Delaware	69
Pecten Overseas Petroleum Company	Delaware	69
Pecten Paraguay Company	Delaware	69
Pecten Philippines Exploration Company	Delaware	69
Pecten Santos Company	Delaware	69
Pecten Santos Exploration Company	Delaware	69
Pecten Santos Petroleum Company	Delaware	69
Pecten Somalia Company	Delaware	69
Pecten Spain Company	Delaware	69
Pecten Syria Company	Delaware	69
Pecten Syria Petroleum Company	Delaware	69
Pecten Thailand Company	Delaware	69
Pecten Trading Company	Delaware	69
Pecten Tunisia Company	Delaware	69
Pecten Tunisia Petroleum Company	Delaware	69
Pecten Victoria Company	Delaware	69
Pecten Vietnam Company	Delaware	69
Pecten Vietnam Petroleum Company	Delaware	69
PICO Limited	Bermuda	69
Pioneer Equipment Company	Delaware	69
Plantation Pipe Line Co.		17
Quazite Corporation	Delaware	35
R&F Coal Company	Ohio	69

Name of Company	State of Incorporation	Percentage Holding
Seaway II Coal Company	Delaware	69
SES, Incorporated	Delaware	69
Shell California Cogeneration Company	California	69
Shell California Production, Inc.	Delaware	69
Shell Capital, Inc.	Delaware	69
Shell Cogeneration Inc.	California	69
Shell Communications	Delaware	69
Shell Cortez Pipeline Company	Delaware	69
Shell Credit, Inc.	Texas	69
Shell Energy Resources, Inc.	Delaware	69
Shell Explorer Limited	Canada	69
Shell Export Company	Delaware	69
Shell Investment, Inc.	Delaware	69
Shell Motorist Club Inc.	Indiana	69
Shell Offshore, Inc.	Delaware	69
Shell Pipe Line Corporation	Maryland	69
Western E&P Inc.	Delaware	69
Taranaki Offshore Petroleum Company	Delaware	100
Taranaki Offshore Petroleum Company Limited	New Zealand	100
Triton Coal Company	Delaware	100
Turris Coal Company	Delaware	100
West Shore Pipe Line Co.		20
Western Farm Service, Inc.	Delaware	100

OUTSIDE UNITED STATES (by nation of incorporation):

Name of Entity	Percentage Holding
ABU DHABI	
Abu Dhabi Bitumen Co. Ltd.	25
Abu Dhabi Company for Onshore Oil Operations	10
Abu Dhabi Gas Industries Ltd.	15
ALGERIA	
Shell d'Exploration	100
ANGOLA	
Cia. de Produtos Farmaceutios Shell Ltda.	100
Shell West Africa	100
ARGENTINA	
Cia. Immobiliaria Dominium, S.A.	100
Shell Compania Argentina de Petroleo S.A.	100
AUSTRALIA	
Austen & Butta Ltd.	42
Australian Coal & Coke Co. Pty. Ltd.	45
Beasam Pty. Ltd.	100
The Bellambi Coal Co. Ltd.	45
Billiton Aluminum Australia	100
S.W. Hart and Co. Pty. Ltd.	50
Highway-Shell Motels Pty. Ltd.	50
Hot Pave Pty. Ltd.	50
Kawecki-Billiton Australia (Pty.) Ltd.	50
Neptune Oil Co. Pty. Ltd.	100
North West Shelf Development Pty Ltd.	50
Nufarm Chemicals Pty. Ltd.	40
Number 1 Spring Street Pty. Ltd.	100
Oil Fuel Recovery Systems Pty. Ltd.	50
Pabco Holdings Pty. Ltd.	50
Pabco Products Pty. Ltd.	50
Paveseal Pty. Ltd.	100
Pioneer Asphalts Pty. Ltd.	50
Poly Pacific Pty. Ltd.	50
Shell Australia Ltd.	100
Shell-BHP Autogas Pty. Ltd.	50
Shell Chemical (Australia) Pty. Ltd.	100
The Shell Company of Australia Ltd.	100

Name of Company	Percentage Holding
Shell Development (Australia) Ltd.	100
Shell Finance (Australia) Ltd.	100
Shell Minerals Exploration (Australia) Pty. Ltd.	100
Shell Refining (Australia) Pty. Ltd.	100
Shellcrete Pty. Ltd.	50
Shorko Australia Pty. Ltd.	50
Shorncliffe Pty. Ltd.	100
Solahart Pty. Ltd.	50
South Coast Gas Co. Pty. Ltd.	100
Spraypave Pty. Ltd.	100
W.A.G. Pipeline Pty. Ltd.	52
West Australian Natural Gas Pty. Ltd.	29
Windarra Nickel Mines Pty. Ltd.	100
Woodside Petroleum Ltd.	21
Worsley Alumina Pty. Ltd.	30
AUSTRIA	
Adria Hafen Studiengesellschaft m.b.H.	17
Adria-Wien Pipeline G.m.b.H.	15
Asphalt-Werk Govedic G.m.b.H.	100
Attems G.m.b.H.	100
Autobahnbetriebe G.m.b.H.	13
Autogas Vertriebsgesellschaft m.b.H.	50
Brennstoffhandel A. Neubauer G.m.b.H.	80
Colas Bauchemie G.m.b.H. (Austria)	100
Colas Bauservice G.m.b.H.	100
"Comfort" Heiztechnik G.m.b.H.	50
"Comfort" Heiztechnik G.m.b.H. & Co. K.G.	50
Erdoel-Lagergesellschaft m.b.H.	17
Gewerkschaft Elwerath und Co. G.m.b.H.	50
"Heitzoelexpress"—Heizdelhandels G.m.b.H.	100
Latexfalt Industrie Fussboden G.m.b.H.	100
MHG Heger G.m.b.H.	100
MHG-Tinhof G.m.b.H.	100
MHG-Zorn G.m.b.H.	100
Oesterreiche Gesellschaft Fuer Sonnenergie und Weltraumffagen G.m.b.H.	7
Peter Troppacher G.m.b.H.	100
Possehl Spezialbau G.m.b.H.	50

Name of Company	Percentage Holding
Rohoel-Aufsuchungs G.m.b.H.	50
Ruderstaller G.m.b.H.	100
Shell Austria A.G.	100
Shell Badr el Din	100
Shell Qarun, Erdoelauis u Chungs und Gewinnungs G.m.b.H.	100
Shell Sitra Erdoelaufsuchungs-und-Gewinnungs G.m.b.H.	100
S & S Brennerservice G.m.b.H.	50
S & S Brennerservice G.m.b.H. & Co. K.G.	50
Temana Beteiligungs G.m.b.H.	100
Temana Chemie-Produkte G.m.b.H. & Co. K.G.	100
Transalpine Oelleitung in Osterreich G.m.b.H.	15
Waermerbetriebe G.m.b.H.	100
Waermerdienst Kleinsasser G.m.b.H.	100
Weener Ofenoelvertrieb G.m.b.H	100
BAHAMAS	
Bahamas Service Stations Ltd.	100
Conch International Methane Ltd.	40
Shell Bahamas Ltd.	100
Shell Caribbean Trading Ltd.	100
The Shell Company (Nassau) Ltd.	100
Venezuelan Eagle Oil Co. Ltd.	100
BANGLADESH	
Bangladesh Shell	100
BARBADOS	
Shell East Caribbean Offshore Services Ltd.	100
Shell East Caribbean Services Ltd.	100
Shell Trading (Caribbean) Ltd.	100
BELGIUM	
Bayer-Shell Isocyanates N.V.	50
Soc. Belge de Transport par Pipeline S.A.	10
Belgian Shell S.A.	100
Brussels Airfuels Services (B.A.S.) Soc. Cooperative	33
Caloterm S.A.	100
Car Accessories & Specialties S.A.	100
Chauffage Liege-Verviers (Chauliver) S.A.	100
CHB-Devis S.A.	100
Coas S.A.	100

Name of Company	Percentage Holding
Distrigaz, S.A.	17
Dumo Plastics N.V.	100
Ethyleen Pijpleiding Mij. (Belgie)	50
S.A. Flexible Foam Co.	40
Fonderies Reunies S.A.	100
Gestion Commerciale, Administrative et Financiere	100
Hainaut Chauffage S.A.	100
Herentals Heating N.V.	50
H.J. VanDer Rijn N.V.	100
Kroch Engineering Company N.V.	50
Lambert en Dauwe	51
N.V. Limbuterm	100
Metaalmij Henrichs & Verhaegen N.V.	100
Metrec Metals Recycling N.V.	100
Oric S.A.	100
Ryan Europe S.A.	50
Shell Immeubles Belges S.A.	100
Soc. de Distribution du Gaz	17
Soc. Gantoise d'Affinage Sogaf S.A.	100
Sodexcar S.A.	50
Sotherng S.A.	100
Stramit-Tungren P.B.V.A.	50
Studies Engineering & Services S.A.	100
Sylvan Belgium N.V.	94
BELIZE	
Shell Belize Ltd.	100
BERMUDA	
Bitumen Supply Co. Ltd.	50
Carribbean Shell Finance Ltd.	100
Nautilus Leasing Ltd.	100
Nautilus Limited	100
Petroleum Insurance Ltd.	100
Shell Bermuda (Overseas) Ltd.	100
The Shell Co. of Bermuda Ltd.	100
Shell Eastern Trading Company Ltd.	100
Shell Finance (Development) Co. Ltd.	100
Shell Holdings (Bermuda) Ltd.	100
Shell Middle East Trading Co. Ltd.	100

Name of Company	Percentage Holding
Shell Overseas Trading Ltd.	100
Shell Saudi Arabia (Refining) Ltd.	100
Shell Trust (Bermuda) Ltd.	100
Solen Insurance Limited	100
Tacoma Co. Ltd.	100
BOLIVIA	
Shell Bolivia S.R.L.	100
BOTSWANA	
Billiton Botswana (Pty.) Ltd.	100
Protea Asphalt (Pty.) Ltd.	50
Shell Oil Botswana (Pty.) Ltd.	100
Shell Coal Botswana (Pty.) Ltd.	100
BRAZIL	
Arbo Comercio, Industria e Reflorestamento Ltda.	100
Asfaltos Vitoria Ltda.	100
Billiton Metais S.A.	100
Casa do Asfalto Ltda.	100
Com. e Admin. de Postos Shell-Ital Ltda.	100
Com. e. Admin. de Postos Concha Dourada Ltda.	50
Com. e. Admin. de Postos de Gasolina Lonorina Ltda.	50
Cosseno S.A. Com. e. Admin.	100
Empresa Imobiliaria Maranhense	40
Flecha S.A. Turismo Comercio e Industria	48
Floryl Florestadora Ype S.A.	50
S.A. Hotelaria de Sao Jose dos Campos	17
Industria de Aditivos do Brasil S.A.	50
LMS (Botafogo) Imoveis Ltda	50
Mackel S.A. Empreendimentos Industriais e Comerciais	50
Mineracao Rio Abaete Ltda.	100
Mineracao Rio Araguari Ltda.	100
Mineracao Rio Batovi Ltda.	100
Mineracao Rio Camaqua Ltda.	100
Mineracao Rio Cumina Ltda.	100
Mineracao Rio Curva Ltda.	100
Mineracao Rio do Norte S.A.	10
Mineracao Rio Indaia Ltda.	100
Mineracao Rio Iriri Ltda.	100

Name of Company	Percentage Holding
Mineracao Rio Itajai Ltda.	100
Mineracao Rio Jatoba Ltda.	100
Mineracao Rio Jauaperi Ltda.	100
Mineracao Rio Mapuera Ltda.	100
Mineracao Rio Nhamunda Ltda.	100
Mineracao Rio Pajeu Ltda.	100
Mineracao Rio Paramirin Ltda.	100
Mineracao Rio Parana Ltda.	100
Mineracao Rio Tibaji Ltda.	100
Mineracao Rio Tiete Ltda.	100
Mineracao Rio Uatuma Ltda.	100
Petroleo Sabba S.A.	82
Polibrasil S.A. Industria e Comercio	48
Postos Iate Comercio S.A.	60
Rional Compostos Venilicos Ltda.	40
Risel S.A. Comercio e Industria	38
Servicos the Perfuracoes Erasocean Ltda.	50
Shell Brasil S.A. (Petroleo)	100
Shell Exploration Services	100
Shell Quimica S.A.	100
Soptos S.A. Com. e Administracao	100
Temana Productos de Consumo Domestico Ltda.	100
Termerid Mineracad S.A.	87
Transmesa S.A. Transporte e Mecanica	38
Valesul Alumino S.A.	44
BRUNEI	
Brunei Coldgas Ltd.	33
Brunei LNG Ltd.	33
Brunei Shell Marketing Co. Ltd.	50
Brunei Shell Petroleum Co. Ltd	50
CAMBODIA	
Shell Cambodge	100
CAMEROON	
Soc. des Bitumes et Cut Backs du Cameroun	5
Camgaz	50
Soc. Cameroonaise des Depots Petroliers	10
Soc. Cameroonaise Equatoriale de Fabrication de Lubricants	20
Soc. Shell Cameroonaise de Recherches et d'Exploitation	100

Name of Company	Percentage Holding
Soc. Shell Chimie Douala	100
Soc. Shell du Cameroon	100
Soc. Sucriere du Camaroon	4
CANADA	
Alberta Products Pipeline Ltd.	8
Alsands Energy Ltd.	79
Artelonics Ltd.	79
Atco Marine Exploration Ltd.	28
Beaver Service Centres Ltd.	79
Billiton Canada Ltd.	100
Bioshell Inc.	79
Bulkley Valley Collieries Ltd.	79
Canadian Autocare Ltd.	79
Canadian Oil Co. Ltd.	79
Canadian Plant Breeders Ltd.	50
Carnduff Gas Ltd.	8
Cascade Pipe Line Ltd.	8
Comen & Sons Fuels Ltd.	79
Commercial Solids Pipe Line Co.	39
Crows Nest Forest Products Ltd.	79
Crows Nest Forest Products (1982) Ltd.	79
Crows Nest Industries Ltd.	79
Crows Nest Resources Ltd.	79
Cynthia Gas Gathering Co. Ltd.	1
Enesco Chemicals Ltd.	31
Enterprises Ltd.	13
Enviroglas Inc.	79
Fibreco Export Inc.	2
Handy Andy Inc.	16
International Energy Co.	1
Interprovincial Pipe Line Ltd.	2
Kootenay and Elk Railway Co.	79
Line Creek Coal Co. Ltd.	79
Mineral Resources International Ltd.	3
Montreal Pipe Line Co. Ltd.	13
Nanisivik Mines Ltd.	11
North Star Oil Ltd.	79

Name of Company	Percentage Holding
Nova, An Alberta Corporation	1
Peace Pipe Line Ltd.	10
Petrogas Processing Ltd.	20
Progas Ltd.	8
Redwater Water Disposal Co. Ltd.	1
Rimbey Pipe Line Co. Ltd.	7
Shell Canada Ltd.	79
Shell Canada Resources Ltd.	79
Shell Canadian Tankers Ltd.	79
Shell Chemical Corp. of Canada Ltd.	79
Shell Investments Ltd.	100
Shell Petroleum Co. of Canada Ltd.	79
Shell Properties Ltd.	100
Shell Quebec Limited	79
Sulconam Inc.	6
Sultran Ltd.	11
Sun-Canadian Pipe Line Co. Ltd.	34
Trans-Northern Pipelines Inc.	26
Trans-Mountain Pipe Line Co. Ltd.	7
Vocatel Inc.	79
Weathercoating Inc.	39
CAPE VERDE ISLANDS	
Shell Cabo Verde S.A.R.L.	100
CAYMAN ISLANDS	
Nickerson International Plant Breeders Ltd.	100
CENTRAL AFRICAN EMPIRE	
Soc. Shell Centrafricaine de Recherches et d'Exploitation	100
Total Centrafricaine de Gestion (Tocages)	5
CHILE	
Administradora Estaciones de Servicio Shell S.A.	100
Asseraderos Copihue S.A.	55
Bosques de Chile S.A.	55
Bosques Monterrey Ltda.	55
Inversiones Shell S.A.	100
Reactivos de Flotacion S.A.	100
Shell Chile S.A. Comercial e Industrial	100
Transportes Banco Ltda.	55

Name of Company	Percentage Holding
COLOMBIA	
Cerro Matoso S.A.	44
Shell Colombia S.A.	100
COMORO ISLANDS	
Soc. Comorienne de Produits Petroliers S.A.R.L.	50
COSTA RICA	
Compania Quimica Costarricense S.A.	100
CHINA	
Shell China	100
Shell Exploration (China)	100
CUBA	
C.E.A. Anglo-Cubana de Navegacion S.A.	100
Cia. Distribuatora Mex S.A.	100
Exploradora Insular S.A.	100
Exploradora y Explotadora de Petroleo Puerto Principe S.A.	100
Minera de Bahama	100
Minera de Turiguano	100
Cia. Petrolera la Estrella de Cuba	100
Cia. Petrolera Shell de Cuba S.A.	100
CYPRUS	
Shell Cyprus Trading Ltd.	100
The Shell Services Co. of Cyprus Ltd.	100
DENMARK	
*Aarhaus Coal Terminal	15
A/S af 9/3/1972	100
K. Balling-Engelsen A/S	100
Colas Vejmateriale A/S	100
A/S Dansk Shell	100
Dansk Styropack A/S	100
Ekvidan A/S	100
Det Gronlandske Clieaktieselskab	25
Hydrant Anlaegget Als	25
Metax Olie A/S	100
Musholm Lax Aps	50
Nordisk Wavin A/S	58
P/F Shell	100
Shell Center Bornholm A/S	100
Shell Center Lolland-Falster Moen A/S	100

Name of Company	Percentage Holding
Shell Center Nordsjaelland A/S	100
Shell Center Nordjylland A/S	100
Shell Center Odense A/S	100
Shell Center Ostjylland A/S	100
Shell Center Sjaelland	100
Shell Center Sonderjylland A/S	100
Shell Storkoebenhavn A/S	100
Shell Center Sydjylland A/S	100
Shell Center Vestjylland	100
Shell Center Viborg A/S	100
Shell Farm A/S	100
Shell Olie-og Gasudvinding Denmark	100
A/S Shell Service	100
Temana Danmark Aps.	100
DJIBOUTI	
Petroles de Djibouti	100
Shell Djibouti	100
DOMINICAN REPUBLIC	
Lubricantes Dominicanos, S.A.	50
Polyplas Dominicana C. por A.	5
Propiesa, S.A.	100
Cie. Quimmica Dominicana S.A.	100
Quindoa C. por A.	100
Refineria Dominicana de Petroleo S.A.	50
ECUADOR	
Compania Ecuatoriana de Lubricantes S.A.	70
EGYPT	
Deminex Egypt Oil Co.	17
EL SALVADOR	
Distribuidora Shell de El Salvador S.A.	100
Refineria Petrolera Acajutla S.A.	35
Shell El Salvador	100
Shell Quimica de El Salvador S.A.	100
FEDERAL REPUBLIC OF GERMANY	
AK Chemie G.m.b.H.	37
AK Chemie G.m.b.H. & Co., K.G.	29
Aktionsgemeinschaft Deutsche Steinkohlenreviere G.m.b.H.	2

Name of Company	Percentage Holding
Angewandte Isoliertechnik Ait G.m.b.H.	50
Apollo-Tankstellenbetriebs G.m.b.H.	100
Bardia Handels G.m.b.H.	100
Bayerische Erdgas Leitung G.m.b.H.	17
Bemberg Shorko G.m.b.H.	50
Bernward Kleine Mineralole G.m.b.H.	100
Biekarck Mineralolvertrieb G.m.b.H.	100
Billiton Metals & Ores Deutschland G.m.b.H.	100
Billiton Witmetaal G.m.b.H.	100
Bramin Mineralolvertrieb G.m.b.H.	100
Breusch & Berberich Brenstoffvertrieb G.m.b.H.	100
Caratgas Fluessiggas Versorgungs G.m.b.H.	32
Colas Bauchemie G.m.b.H.	100
Craiss Mineralolvertrieb G.m.b.H.	100
Debef Chemie G.m.b.H.	100
Deudan-Holding G.m.b.H.	33
Deutsche Erdgas Transport G.m.b.H.	32
Deutsche Fleussigerdgas Terminal G.m.b.H.	12
Deutsche Gesellschaft fur Bauinteressen m.b.H.	100
Deutsche Gesellschaft fur Erdoelinteressen m.b.H.	100
Deutsche Gesellschaft fur Oelwaermeinteressen m.b.H.	100
Deutsche Gesellschaft fur Tankstellen-und Parkhausinteressen m.b.H.	100
Deutsche Latexfalt G.m.b.H.	100
Deutsche Shell A.G.	100
Deutsche Shell Chemie G.m.b.H.	100
Deutsche Shell Tanker G.m.b.H.	100
Deutsche Transalpine Oelleitung G.m.b.H.	15
Dima-Chemie Produktions-u-Vertrieb fur Chemische Spezialprodukte G.m.b.H.	100
Dorner & Breuer G.m.b.H.	100
Dumo Plastics G.m.b.H.	100
EMPL Mineralolvertrieb G.m.b.H.	100
Emsland-Erdoelleitung G.m.b.H.	13
Erdgas-Verkaufs G.m.b.H.	14
Este Lager-und Handelgesellschaft m.b.H.	100
Ferngas Salzgitter G.m.b.H.	12
Fluessiggas Grossvertrieb fur Propan und Butan G.m.b.H.	100

Name of Company	Percentage Holding
Fluessiggas Terminal Emden G.m.b.H.	100
Gebr. Wiessner Propan Grossvertrieb G.m.b.H.	100
Gekon Gesellschaft fur Konsumgueter	100
Gekon Temana Gesellschaft fur Chemische Konsumgeuter m.b.H.	100
Gesellschaft fur Datenverarbeitungs Service m.b.H.	100
Gesellschaft fur die Veredelung und den Vertrieb von Mineraloel produkten m.b.H.	100
Gesellschaft fur Gas Interessen m.b.H.	100
Gesellschaft zur Beseitigung von Sondermuell in Bayern m.b.H.	1
Gewerkschaft Brigitta	50
Gewerkschaften Brigitta und Elwerath Betriebsfuehrungs G.m.b.H.	50
Gewerkschaft Elwerath	50
Gewerkschaft Erdoel-Raffinerie Deurag-Nerag	50
Gossling Mineralolvertrieb G.m.b.H.	100
Grubert Mineralolvertrieb G.m.b.H.	100
Hamburgische Schiffbau-Versuchsanstalt G.m.b.H.	3
Hannoverische Erdoelleitungs G.b.m.H.	25
Hans Von Reppert Schmierstoffhandels G.m.b.H.	100
Helios Fernwaermegesellschaft m.b.H.	100
Holsten Mineralolvertrieb Kiel G.m.b.H.	100
Hydranten-Betriebs-Gesellschaft Flughafen Frankfurt/Main Gbr.	17
Industrieversicherungs-Vermittlungs m.b.H.	100
Ingal International Gallium G.m.b.H.	50
Isoliertechnik G.m.b.H.	100
P. Koerber Spezialschmierstoffe fur die Keramik-und Betonindustrie G.m.b.H.	100
Kohnen Mineralolvertrieb G.m.b.H.	100
Main-Taunus Mineralolvertrieb G.m.b.H.	100
Martin Mohlmann Mineralole G.m.b.H.	100
Metrec Metals Recycling G.m.b.H.	100
Meyer Mineralolvertrieb und Warmedienst G.m.b.H.	100
Mineralol-Agentur Albert Gent G.m.b.H.	100
Mineralolvertrieb Amberg Schwandorf G.m.b.H.	100
Mineralolvertrieb Dortmund G.m.b.H.	100
Mineralolvertrieb Einbeck G.m.b.H.	100
Mineralolvertrieb G.m.b.H. Lahn-Dill	100

Name of Company	Percentage Holding
Mineralolvertrieb Mehlem G.m.b.H.	100
Mineralolvertrieb Moller G.m.b.H.	100
Mineralolvertrieb Nordschwaben G.m.b.H.	100
Mineralolvertrieb In Osnabruck G.m.b.H.	100
Mineralolvertrieb Rhenania G.m.b.H.	100
Mineralolvertrieb Staufen G.m.b.H.	100
Mineralolvertrieb G.m.b.H. Sudhessen	100
Minerva Mineralolvertrieb und Berliner Feuerungsdienst G.m.b.H.	100
Mirobo Gesellschaft fur den Vertrieb von Spezialschmierstoffen m.b.H.	100
Mittelrheinische Erdgastransport G.m.b.H.	26
Montanore G.m.b.H.	100
MVK Mineralolvertrieb G.m.b.H.	100
MVO Mineralolvertrieb G.m.b.H.	100
Neckar-Alb Mineralolvertrieb G.m.b.H.	100
Neo-Metall Handelsgesellschaft m.b.H.	100
Neubajer Mineralole G.m.b.H.	100
Nickerson Pflanzenzucht G.m.b.H.	100
Nickerson ZWAAN G.m.b.H.	100
Nordrheinische Erdgastransport G.m.b.H.	20
Norodeutsche Erogas-Aufdereitungs, G.m.b.H.	25
OMV Mineralolvertrieb in Osnabruck G.m.b.H.	100
Pappenberger Mineralolvertrieb G.m.b.H.	100
Possehl Spezialbau G.m.b.H.	50
Propan-Menke, Christian Menke & Co. G.m.b.H.	100
Rauch Mineralolvertrieb G.m.b.H.	100
Recozell Flachdach G.m.b.H.	50
Recozell Kunstoff G.m.b.H. Leichtbauelemente & Co.	25
Recozell-Leichtbauelemente G.m.b.H.	50
Rheinsas-Erdgasleitung G.m.b.H.	25
Rheinische Olefinwerke G.m.b.H.	50
Rhein-Main Rohrieitungstranport G.m.b.H.	41
Rhenania Mineralolvertrieb G.m.b.H. Kaiserlauterm	100
Rhenania Mineralolvertrieb G.m.b.H. Mayen	100
Ruhrgas A.G.	15
Scheibler Mineralolvertrieb G.m.b.H.	100
Schubert K.G.	14

Name of Company	Percentage Holding
Shell Waerme G.m.b.H.	100
Siebe Mineralolvertrieb G.m.b.H.	100
Siegener Mineralolvertrieb G.m.b.H.	100
Stolberger Zincoli G.m.b.H.	50
Sudbadischer Mineralolvertrieb G.m.b.H.	100
Sudgadisc er Mineralolvertrieb G.m.b.H.	100
Sueddeutsche Erdgas Transport G.m.b.H.	32
Tanklager Gesellschaft Koeln-Bonn GBR	14
Tanklager Gesellschaft Yegel GBR	25
Tego Industrie und Bauchemie G.m.b.H.	100
Tejtonia Mineralolvertrieb H. Obermauv G.m.b.H.	100
Thyssengas G.m.b.H.	25
Tiofine (Deutschland) G.m.b.H.	50
Van der Ploeg Samenzuchi G.m.b.H.	100
VWG Mineralole G.m.b.H.	100
VWG-Osmin Mineralolvertrieb G.m.b.H.	100
Wavin G.m.b.H.	100
Weissman Mineralolvertrieb G.m.b.H.	100
Werner Mineralolvertrieb G.m.b.H.	100
Werra-Kunstoff & Co. G.m.b.H.	6
Werra-Kunstoff G.m.b.H.	6
Weser-Elbe Mineralolvertrieb G.m.b.H.	100
Weser Mineraloivertrieb G.m.b.H.	100
Westdeutsche Erdoelleitungs G.m.b.H.	25
Westdeutsche Industrie Siedlungs G.m.b.H.	75
Westgas G.m.b.H.	13
Gebr. Weesener Propan Grossvertrieb G.m.b.H.	100
Wjrzeurger Mineralolvertrieb G.m.b.H.	100
Wohnungs Baugesellschaft Steimbke-Podewald m.b.H.	50
Yeme Shell Explorations G.m.b.H.I.L.	100
A.R. Zwaan und Sohn G.m.b.H.	100
FIJI	
Shell Fiji Ltd.	100
FINLAND	
Espe O/Y	50
Fastighetsaktie balaget Wasa Torgcentrum	100
oy Nesteka A/B	100

Name of Company	Percentage Holding
Rudste-Esto O/Y	100
oy Shell ab	100
FRANCE	
Agrishell	100
Anciens Etablissements A. Poulet	96
Angkor	100
Soc. "Application de Gaz"	70
Artois Informatique	97
Aubry S.A.	24
Soc. Bearnaise des Gaz Liquefies	28
Billiton Exploration France	100
J. Braconnot & Cie.	100
Soc. de Caution Mutuelle pur le Chauffage au Fuel	56
Celor Diffusion	99
Centre Routier du Frenev-Mont Cenis-Frejus	10
Chalvent	81
Soc. des Charbons Industriels du Nord	24
Cie. Chimique de la Mediterranee	50
Soc. du Chlorure de Vinyle de Fos	60
Soc. Civile Immobiliere de la Route de Chevry	75
Colas	20
Comptoir Auxiliare du Petrole	14
Comptoir des Metaux S.A.	30
Soc. pour la Construction et L'entretien des Routes	14
Copitherm-Starex (Soc. de Confort Thermique)	88
Cover-Kote	98
Criterium Garage	98
Depot Petrolier de la Region Stephanoise	11
Depot Petrolier de Mourepiane	5
Depot Petrolier du Gresivaudan	9
Depots de Petrole Cotiers	17
Depots Petroliers de la Corse	10
Les Docks des Petroles D'Ambes	10
D.S.B. Poussier	69
Dorlyl	60
S.A. D'Economie Mixte du Pont de St. Nazaire St. Brevin	8
Entrepot Petrolier de Chambery	27

Name of Company	Percentage Holding
Entrepot Petrolier de Mulhouse	16
Entrepot Petrolier de Nancy	5
Entrepot Petrolier de Valenciennes	15
Etablissement Maritime de Caronte Etde Fos	11
Etablissements Marcel Brieuc	75
Etablissements Maurice Rastello	99
ETS Holland Graines S.A.R.L.	100
Euro Stop Relais	19
Soc. de Fournitures Generales pour l'Automobile	96
Cie. Francaise de l'Etain	100
Soc. Francaise de Stockage Geologique	24
Soc. Francaise du Pipe-Line du Jura	99
Garage de la Poste	96
Soc. du Garage Souterrain de l'Avenue Foch	6
Geng Mazout Sequatherm	97
General Holding	98
Geobutane Lavera	10
Geomines-Caen	10
Geovexin	20
Gerland Etancheite	12
Soc. de Gestion Mobiliere et Immobiliere	100
Soc. Havraise de Manutention de Produits Petroliers	26
Indasco France	100
Cie. Industrielle des Pondereux du Havre	10
Institut de Formation Continue	62
Soc. d'Investissements de Travaux Publics	34
Isobox	100
Soc. de Manutention de Carburants Aviation	16
Maritime de Caronte	11
Soc. Maritime Shell	96
Soc. Mediterraneenne d'Exploitation Thermique	67
Mistral Automobiles	97
Le Moulage Automatique S.A.	74
Nickerson S.A.	100
Soc. du Negoce du Petrole	98
Nickerson S.A.	100
Nickerson International Plant Breeders S.A.	100
Soc. Octel-Kuhlmann	18

Name of Company	Percentage Holding
Octel S.A.	37
Soc. Orange	52
Ouest Confort	89
Soc. du Parc Etoile Foche	9
Soc. Parisienne de Charbons Industriels	21
Soc. du Parking d'Estienne d'Orves	85
Soc. du Parking de la Promenade du Paillon	85
Soc. des Petroles et des Combustibles Liquides	98
Cie. Phoceenne de Chauffage	88
Soc. du Pipeline Geostock "Manosque Berre"	26
Soc. du Pipeline Mediterranee Rhone	16
Soc. du Pipeline Sud-Europeen	20
D.S.B. Poussier	81
Produits Chimiques Fournier	35
La Provencale d'Automation et de Mecanique	24
Soc. Provencale des Bitumes	82
S.A. de la Raffinerie des Antilles	24
Raffinerie du Midi	32
Le Relais des Poids Lourds	96
Cie. Rhenane de Raffinage	84
Cie. Rhenane de Transport Thermique	45
Soc. Rhone Alpes Emonet Thermique	75
Risques Industriellés et Courtage d'Assurances	97
Rivier Chauffage	14
Sabec	90
Servitherm	11
Soc. Shell des Antilles et de la Guyane Francaise	100
Soc. Shell de Recherches et d'Exploitation de Guyane	100
Shell Chimie	100
Shell Francaise	97
Shell Immeubles	100
Shell Recherche S.A.	99
Shell Tour	57
Sochan Soc. Nouvelle de Chauffage	87
Solycaf	84
Soveca	100
Star M.B.	96

Name of Company	Percentage Holding
Soc. du Stockage Geoligique dans le Sel de Manosque	22
Super Station Service Raspail	96
Systemas Energis Services	97
Techniques et Materiels Nouveau (Techmano)	64
Temana France	100
La Thermique Appliquee Moderne	100
Thermocler	94
Soc. des Transports Petroliers Par Pipeline	10
Soc. Pour l'Utilisation Rationelle des Gaz	100
Soc. Vernolienne de Laboratoire	96
Wavin S.A.R.L.	100
FRENCH GUIANA	
Shell des Antilles et de la Guyane Francaises	100
Shell de Recherches et d'Exploitation de Guyane	100
GABON	
Soc. Gabonaise de Cellulose	1
Soc. Gabonaise de Fuis	24
Soc. Gabonsise de Leasing Immobilier	25
Soc. Gabonaise des Petroles Shell	75
Soc. Gabonaise de Raffinage	9
Shell Gabon	75
Soc. Meuniere et Avicole du Gabon	1
Pizo	15
Pizolub	13
Soc. des Produits Oleagineux de Gabon "SEPOGA"	10
GHANA	
Ghana Industrial Farms Ltd.	30
Shell Ghana Ltd.	60
GIBRALTAR	
Shell Gibraltar	100
GREECE	
Alexandroupolis Petroleum Installation S.A.	33
Consuma S.A.	81
Hellas Agro Ltd.	33
Hermes S.A.	100
Ostracon S.A.	53
Rhodes Petroleum Installation S.A.	39
Sellas S.A.	100

Name of Company	Percentage Holding
Shell (Hellas)	100
Shell Chemicals (Hellas)	100
GUATEMALA	
Cia. Distribuidora Guatemalteca Shell	100
Shell Quimica de Guatemala S.A.	100
GUINEA	
Compagnie dex Bauxites de Guinee	3
Shell Aviation Guinee	100
Shell Guinee	100
HONDURAS	
Shell Honduras S.A.	100
HONG KONG	
Phido (Wire Services) Co. Ltd.	60
Shell Developments (H.K.) Ltd.	100
Shell Hong Kong	100
Shell North West Pacific Ltd.	100
Shell Pacific Enterprises Ltd.	100
Taikoktsui Investment Co. Ltd.	100
Woodex International Ltd.	79
ICELAND	
Oliufelagid 'Skeljungur' h.f.	24
INDIA	
National Organic Chemical Industries Ltd.	33
Polyolefins Industries Ltd.	10
Wavin India Ltd.	23
P.B. Waviwell India Ltd.	18
INDONESIA	
Mamberamo Shell	100
P.T. Riau Tin Mining	90
Riau Tin Mining	90
P.T. Wavin Duta Jaya	13
IRAN	
Abadan Lubricants Manufacturing Co.	25
Iran Shell Cott (Sahami Khas)	71
Pars Investment Corporation	14
Pars Oil Company	25
Shell Chemical Company Iran	100
Shell Oil Iran	100

Name of Company	Percentage Holding
IRISH REPUBLIC	
Alumina Contractors Ltd.	35
The Asiatic Petroleum Co. (Dublin) Ltd.	100
Aughinish Alumina Ltd.	35
Aughinish Estates	35
Aughinish Finance Ltd.	35
Aughinish Property (Nominees) Ltd.	35
Baryton Mining Ltd.	100
Billiton Aluminium Ireland Ltd.	100
Billiton Exploration Ireland Ltd.	100
Billiton Solders Ireland Ltd.	100
Chemoran Ltd.	100
Chemoran Road & Building Services Ltd.	100
Cold Chon (Galway) Ltd.	100
Colfix (Dublin) Ltd.	100
Domino Ltd.	100
Ergas Ltd.	75
Ergas (Autogas) Ltd.	75
Ergas (Holdings) Ltd.	75
Ergas (Rentals) Ltd.	75
Euroseeds Ltd.	100
Irish National Gas Ltd.	75
Irish Shell Ltd.	100
Irish Shell Petroleum Development Co. Teoranta	100
Irish Shell Trust Ltd.	100
John G. Rathborne Ltd.	100
Lalor Ltd.	100
Lisheen Investments	100
Nickerson Irish Plant Breeders Ltd.	100
Road Binders Ltd.	100
Road Maintenance Services	100
Shell Composites (Ireland) Ltd.	100
Shell Chemicals Ireland	100
Shell-Mex (Dublin) Ltd.	100
Shellstar Ireland Ltd.	100
Temana Ireland Ltd.	100
Wavin Ferdia Ltd.	58

Name of Company	Percentage Holding
Wavin Ferdia (Exports) Ltd.	58
Wavin Pipes Ltd.	100
ISLE OF MAN	
Billown Lime Quarries Ltd.	100
Colas (I. O. M.) Ltd.	100
C. Kniveton Ltd.	100
C.P. (I.O.M.) Ltd.	100
Thorkeld Brick Co. Ltd.	100
ITALY	
Soc. Italiana Additivi per Carburanti	18
Soc. Italiana per l'Oleodotto Transalpino	15
Shell Italia S.p.a.	100
Temana Italia S.p.a.	100
IVORY COAST	
Soc. Africaine Shell Chimie	100
Consortium des Agrunes et Plantes à Parfum de Cote d'Ivoire	1
Soc. d'Entreposage de San Pedro	7
Gaz de Cote d'Ivoire	16
Soc. Ivoirienne de Fabrication de Lubrifiants	10
Soc. Ivoirienne d'Operations Petrolieres	21
Soc. Ivoirienne de Raffinage	5
Soc. Ivoirenne de Soufflage d'Emballage Plastique	35
Soc. Shell Ivoirienne de Recherches et d'Exploitation	100
Shell Cote d'Ivoire	50
JAMAICA	
Equipment Sales Co. Ltd.	100
Shell Chemicals Jamaica Ltd.	100
JAPAN	
Asahi Kaijirushi K. K.	50
Billiton Metals Japan	100
Chugai Kogyo K. K.	60
Chuo Shell Sekiyu Hambai K.K.	60
Earth Petroleum K.K.	100
Heiwakisen K.K.	24
Hiroshima Shell Pack K.K.	7
Japan Airport Fuelling Services K.K.	6
K.K. Jiyugaoka Estate	80
Jupiter Petroleum K.K.	100

Name of Company	Percentage Holding
Keihin Pipeline K.K.	4
Kichijiya Shell Sekiyu K.K.	25
Kobe Port Service K.K.	9
Kogyo K.K.	10
Kyodo Yushi K. K.	7
Kyoto Sky Parking K.K.	100
Mars Petroleum K.K.	100
Mercury Petroleum K.K.	100
Mieseki Shogi K.K.	33
Mitsubishi Yuka K.K.	27
Neptune Petroleum K.K.	100
Ngkata Yasoemon Shoten	25
Nihon Oil Terminal K.K.	2
Nihon Shell Gijutsu K.K.	50
Nippon LNG K.K.	50
K. K. Nippon Teepol	50
Osaka Shell Pack K.K.	50
Rekisei Kagaku K.K.	48
K. K. Rising Sun	100
Sakai Joint Oil Stockpiling Co. Ltd.	29
Sankyo Yuka Kogyo K.K.	10
Sapporo Shell Pack K.K.	50
Seibu Oil	20
Seibu Sekiyu K.K.	20
Sendai Shell Pack K.K.	50
Shell Garden K.K.	50
Shell Kagaku K.K.	100
Shell Kosan K.K.	100
Shell Sekiyu K.K.	100
Shell Sempaku K.K.	100
Shikohu Kaijirushi Sekiyu K.K.	50
Shin Nishi Nihon Sekiyu Kaihatsu K.K.	31
Shoseki Kasei K.K.	50
Shoseki Kosan K.K.	50
Shoseki Shoji K.K.	50
Shoseki Tanker K.K.	50
Showa Sekiyu K.K.	50

Name of Company	Percentage Holding
Showa Sekiyu Asphalt K.K.	50
Showa Yokkaichi Sekiyu K.K.	50
Toa Sekiyu K.K.	13
Tokyo Shell Pack K.K.	52
Yuka Shell Epoxy K.K.	63
KENYA	
BP Kenya Ltd.	50
The BP-Shell Petroleum Development Co. of Kenya Ltd.	50
Chemelil Sugar Co. Ltd.	1
Colas East Africa Ltd.	100
Crop Protection Chemicals Ltd.	50
East African Oil Refineries Ltd.	13
Kenya Autochemicals Ltd.	42
Kenya Molasses Cattle Feed Ltd.	50
Kenya Shell Ltd.	50
Shell Kenya Provident Trust Ltd.	50
KOREA	
Kukdong Shell Petroleum Co. Ltd.	50
LAOS	
Soc. Shell du Laos	100
LESOTHO	
Lesotho Road Binders (Pty.) Ltd.	50
Shell Oil Lesotho (Pty.) Ltd.	100
LIBERIA	
A.P. Shipping Corp.	100
Lepton Shipping Corp.	
LIECHTENSTEIN	
Breitaker A. G.	50
LUXEMBOURG	
Adela Investment Company S.A.	2
Shell Luxembourgeoise S.A.	100
Transalpine Finance Holdings	15
MALAGASY REPUBLIC	
Bureau Technique Shell Chemie	100
Soc. Malgache de Raffinage	6
Soc. Maritime de Madagascar	50
Produits Lubrifiants de Madagascar	17

Name of Company	Percentage Holding
S.A. de la Residence d' Antaninarenina	50
Soc. Shell de Madagascar et des Comores	50
MALAWI	
Bureau Technique Shell Chimie	100
MALAWI	
Bitumen Products Manufacturing Co. Ltd. (Malawi)	50
Shell Chemical (Malawi) Ltd.	100
MALAYSIA	
Malaysia LNG Sendirian Berhad	18
MBP (Malaysia) Sendirian Berhad	49
Sabah Shell	100
Sarawak Shell	100
Shell Malaysia Ltd.	100
Shell Malaysia Trading S.B.	100
Shell Marketing Borneo	100
Shell Refining Co. (Federation of Malaya) B.	75
Tiram Kimia Sendirian Berhad	49
MALI	
Petromali-Shell	50
MARTINIQUE	
Raffinerie des Antilles	100
MAURITIUS	
Shell Co. of the Islands	100
MEXICO	
Colborn-Dawes Mexico S.A. de C.V.	100
Pirisa, S.A. de C.V.	40
Productora Quimica de Jalisco, S.A.	20
Shell Mexico, S.A. de C.V.	100
MOROCCO	
Soc. de Cabotage Petrolier "Petrocab"	17
Cie. d'Entreposage Communautaire	7
Cie. Marocaine de Transports Maritimes	50
Soc. Shell du Maroc	50
Shell Prospecting	100
NAMIBIA	
Namib Surfacing (Pty.) Limited	50
Soswa Properties (Pty.) Ltd.	100
S.W.A. Road Binders (Pty.) Ltd.	31

Name of Company	Percentage Holding
NETHERLANDS	
Aircraft Fuel Supply B.V.	11
Allen-Rohe B.V.	5
Amsterdam Gas B.V.	100
Assurantiekantoor Interore B.V.	100
Auto West B.V.	100
Bangladesh Shell Petroleum Development B.V.	100
Beleggingsmij. Billiton B.V.	100
Billiton B.V.	100
Billiton Aluminum B.V.	100
Billiton Aluminum Australia B.V.	100
Billiton Delfstoffen B.V.	100
Billiton Exploratie Maatschappij B.V.	100
Billiton Exploratie Maatschappij Indonesia B.V.	100
Billiton Exploration B.V.	100
Billiton International Metals B.V.	100
Billiton International Supply B.V.	100
Billiton Maatschappij Suriname, N.V.	100
Billiton Metalen B.V.	100
Billiton Metals & Ores International B.V.	100
Billiton Metals & Ores Nederland B.V.	100
Billiton Mineralen B.V.	100
Billiton Nederland B.V.	100
Billiton Refractories B.V.	100
Billiton Research B.V.	100
Biliton Vanadium B.V.	100
BK Gas B.V.	100
Gebr. Broersen B.V.	100
Budelco B.V.	50
Comprimo B.V.	36
D.O.C. Dutch Offshore Consortium B.V.	17
B.V. Dordtsche Petroleum Mij.	100
Eerste Nederlandse Witmetaal Fabriek B.V.	100
Eindhovense Olie Centrale B.V.	100
Ethyleen Pijpleiding Mij. (Nederland) B.V.	50
Exploitation Mij. A. van den Ban	100
Exploraciones Marinas Shell N.V.	100

Name of Company	Percentage Holding
Financiering en Administratie Kantoor "FINAD" B.V.	100
Financierings Mij. Improvinans B.V.	100
"Fundus Haganus" B.V.	100
Gascentrum Noord—Nederland B.V.	100
Gasunie LNG Terminal B.V.	25
Gasunie LNG Transport B.V.	25
Handelsvereniging Neptunes Holding B.V.	15
Heynen Transport B.V.	51
Hollandse Metallurgische Industrie Billiton B.V.	100
Industriele Producten Brabant B.V.	50
International Gas Transport Mij. B.V.	50
Isobough B.V.	50
Jambi Shell B.V.	100
Kamphuis Kunstoffen B.V.	59
N.V. Kawecki-Billiton Metaalindustrie	50
Kempensche Zink Mij. "Zincs de la Campine" B.V.	100
B.V. Licht en Kracht Mij.	100
Loogas B.V.	100
Looman van den Ban B.V.	100
*Maasvlakte Coal Terminal B.V.	17
Maasvlakte Coal Terminal C.V.	27
*Maasvlakte Olie Terminal C.V.	16
Maasvlakte Olie Terminal N.V.	14
Mij. Tot Exploitatie Van Benzinstations W. VanZijl B.V.	100
N.V. Mij. Tot Exploitatie Van Vracht—Autocentra	25
B.V. Mij. Tot Exploratie Van Delfstoffen	100
Magnesia International B.V.	50
Mamberamo Shell B.V.	100
Machinefabriek "De Rollepaal" B.V.	100
Marine Drilling B.V.	50
Merchandising Handels en Production Mij. B.V.	100
Metrec Metals Recycling B.V.	100
Montanore B.V.	100
Nautilus Ventures B.V.	100
Nederlands Iraanse Aardole Mij. N.V.	100
Nederlandse Aardolie Mij. B.V.	50
N.V. Nederlandse Gasunie	25
B.V. Nederlandse Internationale Industrie—En Handel Mij.	100

Name of Company	Percentage Holding
Neo-Alcu Metaal B.V.	100
Nickerson International Plant Breeders B.V.	100
Nickerson International Plant Breeders (Marketing) B.V.	100
Nickerson Plant Breeders (Netherland) B.V.	100
Nickerson Zwaan B.V.	100
Nickerson Zwaanesse B.V.	100
Noordelijke Zoutwinning B.V.	50
OBA Group B.V.	20
Oliecentrum Noord-Nederland B.V.	100
Oliecentrum West Nederland B.V.	100
Oliecentrum Midden Nederland B.V.	100
Oliehandel de Ijsselstreek	100
Oliehandel "Midden Nederland" B.V.	100
Pakistan Shell Petroleum Development B.V.	100
Parkeergarage Centrum B.V.	100
Pavement Consultancy Services B.V.	100
Pernex B.V.	100
Petra European Trading Co. B.V.	100
Petrola B.V.	100
B.V. Petroleum Assurantie Mij.	100
Protoplan B.V.	100
Raffinaderij Shell Mersin N.V.	100
Replast B.V.	59
Rijnvis Metalen B.V.	100
Rotterdamse Polyolefinen Mij. B.V.	100
N.V. Rotterdam—Rijn Pijpleiding Mij.	40
G. Schott en Zonen B.V.	100
Sepasu Shell B.V.	100
Soc. Shell d'Exploration B.V.	100
Shell Coal Columbia B.V.	100
Shell Coal Enterprises B.V.	100
Shell Exploradora y Productora de Bolivia B.V.	100
Shell Exploradora y Productora del Peru B.V.	100
Shell Exploration B.V.	100
Shell Exploration & Production Co. B.V.	100
Shell Exploration Services (Brazil) B.V.	100
Shell Financierings Mij. N.V.	100

Name of Company	Percentage Holding
Shell Gas Abu Dhabi B.V.	100
Shell Gas B.V.	100
Shell Hydrocarbons B.V.	100
Shell Internationale Chemie Mij. B.V.	100
Shell Internationale Petroleum Mij. B.V.	100
Shell Internationale Research Mij. B.V.	100
Shell Kernenergie N.V.	100
Shell Manufacturing Services B.V.	100
Shell Nederland B.V.	100
Shell Nederland Chemie B.V.	100
Shell Nederland Raffinaderij B.V.	100
Shell Nederland Verkoopmaatschappij N.V.	100
Shell Norden B.V.	100
Shell Nuclear B.V.	100
Shell Olie-og Casudvinding Danmark B.V.	100
Shell Onvoevend Goed B.V.	100
Shell Overseas Exploration & Production B.V.	100
Shell Overseas Investments B.V.	100
Shell Petroleum Development Co. of Libya B.V.	100
Shell Petroleum Development Mozambique B.V.	100
Shell Production B.V.	100
Shell Prospecting B.V.	100
Shell Research B.V.	100
Shell Spanje N.V.	100
Shell Tankers B.V.	100
Shell Winning N.V.	100
Shop Service Center B.V.	100
Singkap Tin Mij. B.V.	100
Siri Shell B.V.	100
Steenkolenhandel Jansen-Bots B.V.	100
Stramit B.V.	50
Sunda Shell N.V.	100
Synbra Unie B.V.	50
Synprodo B.V.	50
Syria Shell Petroleum Development B.V.	100
TDF Tiofine B.V.	50
Temana Nederland B.V.	100

Name of Company	Percentage Holding
Termokomfort B.V.	40
Termoshell Centrum B.V.	100
Tewa B.V.	100
N.V. Turkse Shell	100
Ultra-Centrifuge Nederland N.V.	25
Vac-Gebouw	25
Van den Ban Landbouw B.V.	100
Van den Ban Oliehandel Dordrecht B.V.	100
Van de Rest Butagas B.V.	100
Van der Ploeg Elite Zaden B.V.	100
Van Staveren B.V.	100
Vervoerkantoor Intercito B.V.	100
Voorburgsche Huizen B.V.	100
Vriz Uit B.V.	45
Wafilin B.V.	100
Wavin B.V.	58
Wavin Alpha B.V.	58
Wavin Assurantie B.V.	58
Wavin Beta I B.V.	58
Wavin Delta I B.V.	58
Wavin Diensten D.V.	100
Wavin Gamma I B.V.	58
Wavin KLS B.V.	100
Wavin Nederland B.V.	100
Wavin Nederland Beheer B.V.	100
Wavin Overseas B.V.	100
Wavin Staf B.V.	58
Wavin TWP Beheer B.V.	100
B.V. Wavin KPS	100
B.V. Wavin KSA	100
B.V. Wavin PFP	100
B.V. Wavin R and D	100
B.V. Wavin TWP	100
Westfriese Sietses Isolatie B.V.	100
Westfriese Sietses B.V.	100
Westgastransport B.V.	26
Woldejk Landbouw Centrum B.V.	33
Zuid Drents Oliecentrum B.V.	100

Name of Company	Percentage Holding
B.V. Zuid Nederlandse Olie Centrale	100
Zwaan Seeds B.V.	100
NETHERLANDS ANTILLES	
Bullenbay Marine Services N.V.	90
Curacao Oil Terminal N.V.	90
N.V. Curacaosche Scheepvaart Mij.	100
N.V. Curacaose Petroleum Assurantie Mij.	100
N.V. Internationale Beleggingmij.	100
Madrico N.V.	50
N.V. Petroleum Beleggingsmij.	100
Pecten Curacao N.V.	70
Radio Holland B.V.	10
Raffinaderij Shell Mersin N.V.	100
Sez Services N.V.	33
Shell Antilles and Guianas	100
Shell Curacao N.V.	100
Shell Holding and Licensing N.V.	100
Shell International Finance N.V.	100
Shell Nederlandse Antillen Verkoopmij. N.V.	100
NEW ZEALAND	
B.P. Shell Todd (Canterbury) Services Ltd.	45
Chudleigh Oil Processing Ltd.	50
Crofton Downs Auto Services Ltd.	100
Davin Industries Ltd.	50
Egmont Oil Wells Ltd.	38
Fulton Hogan Holdings Ltd.	25
Gas Liquids Investigating Co. Ltd.	15
H. Baigent & Sons Ltd.	50
Horticultural Merchants Ltd.	40
Kent Heating Ltd.	100
Liquigas Ltd.	19
Mangakahia Forest Ltd.	50
Maui Development Ltd.	19
The New Zealand Refining Co. Ltd.	17
Northland Forest Management Ltd.	50
Reliable Group Holdings Ltd.	50

Name of Company	Percentage Holding
Reliable Roads Ltd.	50
Robert Chemicals Ltd.	100
Shell and BP Pipeline Services Ltd.	50
Shell BP and Todd	38
Shell Chemicals New Zealand Ltd.	100
Shell Forestry New Zealand Ltd.	100
Shell Gas New Zealand Ltd.	100
Shell Manufacturing New Zealand Ltd.	100
Shell New Zealand Holding Co. Ltd.	100
Shell New Zealand Pensions Ltd.	100
Shell Oil New Zealand Ltd.	100
Shell (Petroleum Mining) Co. Ltd.	100
Shell Western Exploration Co. Ltd.	100
Taranaki Oil and Gas Ltd.	28
Temana New Zealand Ltd.	100
Waikato Bitumen Co. Ltd.	50
NICARAGUA	
Compania Quimica Nicaraguensa S.A.	100
Elaboradora Centro Americano de Lubricantes S.A.	100
Shell Nicaragua S.A.	100
NIGER	
Shell Niger	100
Shell Nigeriene de Recherches et d'Exploitation	100
NIGERIA	
Bonny LNG Ltd.	10
National Oil and Chemical Marketing Co. Ltd.	40
Offshore Petroleum Explorations (Nigeria) Ltd.	50
The Shell Petroleum Development Co. of Nigeria Ltd.	100
NORWAY	
A/S Adamstuen Garasjer	100
Andoeya Traffiklag A/S	12
Bergen Servicesenter A/S	10
Botnaneset A/S	19
A/S Bratliegarasjen	100
Fornebu Bilservice A/S	50
A/S Horten Sentrumsbygg	100
A/S Ilargarasjen	100

Name of Company	Percentage Holding
Lena Rutebilsenter A/S	33
Lysaker Oljehavn A/S	50
Marienlyst Garasjer	10
A/S Norske Shell	100
Norske Wavin A/S	59
Ofottank A/S	49
Parkeringhaus A/S	25
Shellgaarden, Oslo	100
Shell Garasjen	100
Shell-Service A/S Bergen	100
Shell-Service A/S Honefoss	100
Shell-Service A/S Kristiansand S.	100
Shell-Service A/S Oslo	100
Shell-Service A/S Skeosmdvollen	100
Shell-Service A/S Stayanger	100
Shell-Service A/S Trondheim	100
Statfjord Transport A/S	8
OMAN	
Petroleum Development Oman Ltd. Liability Company	34
PACIFIC ISLANDS (French)	
Soc. de Gaz d'Oceanie	4
Soc. de Manutention de Carburants Aviation de Tahiti S.A.R.L.	25
Soc. des Petroles Shell des Iles Francaises du Pacifique	100
Shell (Pacific Islands)	100
Shell Papua New Guinea	100
PAKISTAN	
Burmah Shell Pakistan Pensions Trust Ltd.	25
Burmah Shell Pakistan Provident Trust Ltd.	25
Burshane (Pakistan) Ltd.	32
Pakistan Burmah Shell Ltd.	25
Pakistan Refinery Ltd.	15
Pakistan Shell Petroleum Development	100
PAK People Products Corporation Ltd.	25
PANAMA	
Drillpack S.A.	50
Interocean Drilling S.A.	50
Marine Drilling S.A.	50

Name of Company	Percentage Holding
Nautilus Enterprises S.A.	100
Private Investment Company for Asia S.A.	1
Tanker Owners, S.A.	100
PAPUA NEW GUINEA	
Shell Papua New Guinea Pty. Ltd.	100
Shorncliffe (PNG) Pty. Ltd.	100
PARAGUAY	
Compania Administradora de Estaciones de Servicio	100
Shell Paraguay	100
PERU	
Compania de Petroleo Shell del Peru S.A.	100
Shell Exploradora del Peru	100
Shell del Peru	100
PHILIPPINES	
Billiton Minerals (Philippines), Inc.	100
Billiton Philippines Inc.	100
Chemical Systems Corp.	12
First Philippine Industrial Corp.	40
NDC and Shell (Billiton) Minerals Investment Corp.	40
Philippine Petroleum Corp.	28
Philippines Shell Energy Development Enterprises	100
Pilipinas Shell Petroleum Corp.	50
The Shell Chemical Co. (Philippines) Inc.	100
Shell Distribution Co. Inc.	100
Shell Exploration (Philippines) Inc.	100
Shell Gas Philippines Inc.	80
PORTUGAL	
Soc. Acoreana de Armazenagem de Gas, S.A.R.L.	25
Billiton Portuguesa-Desenvolvimento Mineiro Ltd.	100
Desenvolimento Mineiro Ltda.	100
Eurago—Sociedad Agricola, Ltda.	25
Flexipol—Espumas Sinteticas Ltda.	34
Cia. Lusitana do Alumino De Guine e Angola S.A.R.L.	90
OPCA—Nova Organizacao de Obras Publicas e Cimento Armado, Ltda.	3
Soc. Portuguesa de Navios—Tanques Ltda.	3
Cia. Portuguesa de Orbras Para O Turismo Ltda.	100

Name of Company	Percentage Holding
Shell Portuguesa S.A.R.L.	100
Temana—Consumer Products (Portugal) Ltd.	100
PUERTO RICO	
Felco Puerto Rico Inc.	100
The Pipelines of P.R. Incorporated	40
Servicecentro Automotriz Inc.	100
Shell (Puerto Rico)	100
QATAR	
Dukhan Service Company	24
Qatar Shell Service Co.	100
REUNION	
Soc. Reunionnaise d'Entreposage	10
Soc. Reunionnaise de Produits Pétroliers	50
SARAWAK	
Sarawak Shell Berhad	100
SAUDI ARABIA	
Peninsular Aviation Services Co. Ltd.	25
Petromin Shell Refinery Co. Ltd.	50
Saudi Arabian Markets and Shell Lubricants Co.	50
Shell Minerals Exploration	100
SENEGAL	
Soc. Africaine de Raffinage	12
Bel-Air Entreposage	44
Soc. Dakaroise d'Entreposage	13
Iransen et Shell	50
Soc. de Manutention de Carburants Aviation Dakar Yoff	8
Cie. Senegalaise de Lubrifiants	20
Sengaz	11
SIERRA LEONE	
The Sierra Leone Petroleum Refining Co. Ltd.	18
Shell Sierra Leone Ltd.	60
SINGAPORE	
Asiatic Property Co. (Pte.) Ltd.	100
Development Holdings (Pte.) Ltd.	100
Ethylene Glycols (Singapore) (Pte.) Ltd.	20
Shell Chemicals Company of Southeast Asia (Pte.) Ltd.	100
Shell Eastern Chemicals (Pte.) Ltd.	100
Shell Eastern Lubricants (Pte.) Ltd.	100

Name of Company	Percentage Holding
Shell Eastern Petroleum (Pte.) Ltd.	100
Shell Lubricants Blending (Singapore) (Pte.) Ltd.	100
Shell Pacific Developments (Pte.) Ltd.	100
Shell Singapore Alkoxide Products (Pte.) Ltd.	100
Shell Singapore (Pte.) Ltd.	100
Wavin Far East Private Ltd.	58
SOLOMON ISLANDS	
Shorncliffe (Solomon Islands) Ltd.	100
SOMALIA	
Shell Petroleum Development Co. of Somalia S.R.	100
Shell Somalia	100
SOUTH AFRICA	
Abecol (Pty.) Ltd.	50
Abecol Management Services (Pty.) Ltd.	50
African Bitumen Emulsions (Pty.) Ltd.	50
Associated Octel Co. (South Africa) (Pty.) Ltd.	37
Billiton Exploration South Africa (Pty.) Ltd.	100
Billiton Exploration S.W.A. (Pty.) Ltd.	100
Bitroid (Pty.) Ltd.	50
Cera Oil South Africa (Pty.) Ltd.	60
Cera Properties (Pty.) Ltd.	60
Cera Transport & Leasing Co. (Pty.) Ltd.	60
Chemical & Machine Cleaning Services (Pty.) Ltd.	80
Chemico (Pty.) Ltd.	27
Dan Properties (Pty.) Ltd.	100
Delport Bros. Garage & Motor Service (Pty.) Ltd.	100
Denso South Africa (Pty.) Ltd.	25
Dundee Road Products (Pty.) Ltd.	50
Easigas (Pty.) Ltd.	100
Honeylube (Pty.) Ltd.	60
Jacobs Holdings (Pty.) Ltd.	100
Kipdaw (Pty.) Ltd.	100
Manhattan Syndicate Ltd.	50
Melville Properties (Pty.) Ltd.	100
Octel Associates (South Africa)	19
Panplaats Coal Mining Co. (Pty.) Ltd.	100
Pattattafontein (Eindoms) Beperk	100

Name of Company	Percentage Holding
Pegray Investments (Pty.) Ltd.	100
Petrocol (Pty.) Ltd.	50
Pipe Coat (Pty.) Ltd.	50
Protea Asphalt (Pty.) Ltd.	50
Rampart Holdings (Pty.) Ltd.	100
Richards Bay Coal Terminal	15
Robtil Investments (Pty.) Ltd.	100
Semco Lubricants and Chemicals (Pty.) Ltd.	27
Shamrock Mining and Prospecting Company (Pty.) Ltd.	100
Shell and BP South African Petroleum Refineries (Pty.) Ltd.	50
Shell Chemical Mocambique (Pty.) Ltd.	100
Shell Coal South African (Pty.) Ltd.	100
Shell South Africa (Pty.) Ltd.	100
Shell Southern Marketing (Pty.) Ltd.	100
South Africa Lubricants Manufacturing Company (Pty.) Ltd.	34
Styrochem (Pty.) Ltd.	25
S.A. Technical Sales and Manufacturing (Pty.) Ltd.	50
Transvaal Oil Refinery (Pty.) Ltd.	60
Trek Eelegings Beperk	17
Trek Clie Mij. (EDMS) Beperk	17
Trek Petroleum (Eiendoms) Beperk	17
Venturon (Pty.) Ltd.	100
Water Sealers (Pty.) Ltd.	50
SOUTH KOREA	
Aekyung and Shell Co. Ltd.	50
Kukdong Shell Petroleum	50
Shell Pacific Enterprises	100
SPAIN	
Almacenamientos Petroliferos Dishell S.A.	50
Area de Servicio Shell Martorell S.A.	50
Billiton Espanolo S.A.	100
Derivados Fenolicos S.A.	92
Espanolo Shell	100
Cia. General de Semillas S.A.	100
Herfeo, S.A.	48
Industrias Quimicas Asociadas S.A.	33
Cia. Maskor S.A.	100
Navarra Productora de Semillas S.A.	50

Name of Company	Percentage Holding
Cia. Maskor S.A.	100
Soc. Petrolifera Espanola Shell S.A.	100
SRI LANKA	
Lankem Ceylon Ltd.	39
SUDAN	
Port Sudan Refinery Ltd.	50
Shell Sudan Refinery	100
Shell Trust (Sudan) Ltd.	100
SURINAM	
Billiton Suriname	100
Shell Suriname N.V.	100
Shell Suriname Verkoop Mij. N.V.	100
SWAZILAND	
Petrocol (Swaziland) (Pty.) Ltd.	50
Shell Oil Swaziland (Pty) Ltd.	100
SWEDEN	
Arne Skoog Olje A.B.	100
Bensin Stationen Knut Ekman A.B.	100
Boras Oljecentral A.B.	100
Bransleenergi A.B.	100
Dahlbergs Bransle A.B.	100
A.B. Djurgardsberg	5
A.B. Donald Jobson	100
Drivmedelscentralen	2
A.B. Fenom	75
F.S.O.A.	31
A.B. Gunnar Perrsons Bensin & Service	100
Koppartrans A.B.	100
Leopold Thorn A.B.	100
A.B. Svenska Petroleum Administration	17
A.B. Svenska Shell	100
Leopold Thorn A.B.	100
Norlins Bransle A.B.	100
Noroflex A.B.	50
A.B. Nynasstationer	100
Oljeceniralen I Linkoping A.B.	100
Pegasus A.B.	50
Pol Transport A.B.	50

Name of Company	Percentage Holding
Shellgas	100
Shell-Karlivagan Aktiebolag	100
Shell Raffinaderi A.B.	100
Redert A.B. Schell	100
Rex Oljedistribution A.B.	100
A.S. Sylan A.B.	100
A. Scholander and Co. A.B.	100
Stations A.B. Aspudden	91
Stations A.B. Bfaskens	100
Stations A.B. Fagatan 10 I Norr Klping	46
Stations A.B. Ruby	92
Stations A.B. Sofielundsplan	92
Stations A.B. Sollentuna	92
Stations A.B. Taby	100
Stockholms-Behsin & Oljedistributorer	100
Svenska Petroleum Institutet A.B.	20
A.B. Svensk Petroleum Administration	17
Svensk Petroleumlagering Tre A.B.	12
Svenska Shell	100
Svenska Wavin A.B.	58
Sylvan A.B.	100
Tankbaren-Lagpris	100
Temana-Revikal A.B.	90
Thestrup	100
Uppsala Bensin & Olje A.B.	100
SWITZERLAND	
Agroplant A.G.	50
Alpine-Marine Drilling Co. A.G.	50
Bahimiof Parking A.G.	40
Baselland Petrol A.G.	49
Billiton Zug A.G.	100
Elwerath Erdoel und Erdgas A.G.	50
S.A. des Hydrocarbures	25
Soc. Immobiliere des Planches Vallier S.A.	49
Intererra Parking S.A.	5
Jura Bernois Petrole S.A.	49
Jura Petrole S.A.	49
Jura Soleurois Petrol S.A.	49

Name of Company	Percentage Holding
Jura Vaudois Petrole S.A.	49
Leag Aktiengesellschaft fur Luzernisches Erdoel	25
Margot & Paquette S.A.	100
Oleoduc du Jura Neuchatelois S.A.	49
Petrol-Charmettes S.A.	100
Petrosvibri S.A.	25
S.A. du Pipeline a Produits Petroliers sur Territoire Genevois	14
Raffinerie de Cressier S.A.	100
Restoroute de la Gruyere S.A.	3
Ruey S.A.	100
Saraco S.A. Geneva	17
Seag Aktiengesellschaft fur Schweizerisches Erdoel	25
Shell (Switzerland)	100
Tanklager Altishausen A.G.	33
Tanklager Lechelles S.A.	18
Tap-Tankanlage Rumlang A.G.	3
Temana Verkaufs A.G.	100
Termoplan A.G.	100
Termoplan Tankservice A.G.	54
Termoservice A.G.	50
Termostock S.A.	100
Ubag Unterflurbetankungsanlage Flughafen, Zurich	10
TANZANIA	
Hamas Ltd.	100
Shell Petroleum Development Tanzania Ltd	100
Shell Tanzania	100
Van Der Ploag (Tanganyika) Ltd.	100
TCHAD	
Soc. d'Etude et d'Exploitation de la Raffinerie du Tchad	40
Soc. Shell du Tchad	100
Soc. Shell Tchadienne de Recherches et d'Exploitation	100
Soc. Tchadienne d'Entreposage de Produits Petroliers	20
THAILAND	
Alpha Holding Co. Ltd.	49
Billiton Thailand Ltd.	100
Metals Exploration and Development Co. Ltd.	100
Phuket Shipping Services Co. Ltd.	85
Shell Thailand	100

Name of Company	Percentage Holding
Shell Thailand Manufacturing	100
South Thailand Shipping Services Co. Ltd.	72
Spiracia Forestry Co. Ltd.	37
Temsarco Company Limited	100
Thailand Smelting and Refining Co. Ltd.	100
Thai Ocean Transportation Co. Ltd.	30
The Thai Oil Refiners Co. Ltd.	15
Thai Petrochemical Co. Ltd.	69
Thai Shell Exploration and Productions Co. Ltd.	100
TOGO	
Togo et Shell	50
Soc. Togolaise d'Entreposage	10
TRINIDAD	
Shell Chemicals and Services (East Caribbean) Ltd.	100
TUNISIA	
Soc. Butagaz-Tunisie S.A.R.L.	100
Soc. Nordgaz S.A.	50
Soc. Shell de Tunisie	100
Soc. Shell Tunisienne de Development Petrolier	100
Soc. Shell Tunisienne de Recherches et d'Exploitation Tunirex S.A.	100
Sudgaz S.A.R.L.	53
Tunishell	100
TURKEY	
Atas-Anadolu Tasfiyehanesi A.S.	27
Shell Petrol A.S.	100
Shell Turkey	100
Susa Sivi Maddeler Sanayi ve Pazarlama Anonim Sirketi	49
UGANDA	
Shell Uganda Ltd.	50
Shell Uganda Provident Trust Ltd.	50
UNITED KINGDOM	
A&S Constructors Ltd.	100
Abu Dhabi Petroleum Co. Ltd.	24
Allmacadams Ltd.	100
Allmacadams Supplies Ltd.	100
Allroads Plant Hire Ltd.	100
Amalgamated Oxides (1939) Ltd.	100

Name of Company	Percentage Holding
Amos Smith & Sons Ltd.	100
Amos Smith & Sons (Aluminum) Ltd.	100
Amos Smith & Sons (Preston) Ltd.	100
The Anglo-Saxon Petroleum Co. Ltd.	100
Apiezon Products Ltd.	50
The Asiatic Petroleum Co. Ltd.	100
The Associated Octel Co. Ltd.	37
Associated Octel Co. (Plant) Ltd.	37
Autoguard (Automotive Services) Co. Ltd.	100
Bakers Nurseries Ltd.	100
Bannergrade Ltd.	100
Barchester Bituminous Products Ltd.	100
Basrah Petroleum Co. Ltd.	24
B.B.E. (Contracting) Ltd.	100
Beeches Poultry (Knockholt) Ltd.	100
Bees of Chester Ltd.	100
Billiton-Enthoven Metals Ltd.	100
Billiton Exploration (U.K.) Ltd.	100
Billiton Metals & Ores (U.K.) Ltd.	100
Billiton Minerals (U.K.) Ltd.	100
Billiton Overseas Ltd.	100
Billiton Solders U.K. Ltd.	100
Billiton (U.K.) Ltd.	100
Birtley Engineering Ltd.	50
Birtley Engineering (Holdings) Ltd.	50
Bitumals Ltd.	100
Blacksmith Chemical Services Ltd.	50
Bond & Leighton Ltd.	100
BP Marketing Ltd.	60
Bristowes Tarvia Ltd.	100
British Bitumen Emulsions (Scotland) Ltd.	100
British Hybrid Cereals Ltd.	51
British Lead Mills Ltd.	100
British Pipeline Agency Ltd.	50
Bryantor Metals Ltd.	100
Burmah-Shell Oil Storage & Distributing Co. of India Ltd.	50
Burmah-Shell Oil Storage & Distributing Co. of Pakistan Ltd.	50

Name of Company	Percentage Holding
Callenders Ltd.	100
Callenders Bituminous Products Ltd.	100
Callington Zinc Oxide Co.	100
Candles Ltd.	100
Candles Provident Trust Ltd.	100
Certified Seed Ltd.	100
The Ceylon Candle Co. Ltd.	100
Chemical Spraying Co. Ltd.	100
Chemidus Wavin Ltd.	100
City Petroleum Co. Ltd.	100
Colas (Grantham) Ltd.	100
Colas Products Ltd.	100
Colas (Scotland) Ltd.	100
Colas (U.K.) Ltd.	100
Colborn Vitafeeds Research Ltd.	100
The Consolidated Petroleum Co. Ltd.	50
The Consolidated Petroleum Supply Co. Ltd.	50
C.S.C. (Fuels) Ltd.	100
Deeside Titanium Ltd.	63
Devon Fuels Ltd.	100
Dussek Bitumen & Taroleum Ltd.	100
E. G. Dudman Ltd.	100
E.G.M. Solders (Scotland) Ltd.	100
East Kent Packers Ltd.	1
Emerald Velvet (Overseas)	100
Enthoven & Sons Ltd.	100
Ergas (N.I.) Ltd.	75
Ergas (U.K.) Ltd.	75
Expanded Polystyrene Technology Ltd.	100
Farm Management Ltd.	100
Farm Seeds Ltd.	100
Farm Seeds (Potatoes) Ltd.	100
Firland Metals Ltd.	100
Gateway West Argyll Ltd.	100
George M. Callender & Co. Ltd.	100
Girdler Brunton Ltd.	100
The Grozny-Sundja Oil Fields, Ltd.	86
Hamilton Transport Ltd.	100

Name of Company	Percentage Holding
Harvey Waddington Ltd.	100
Hazelsun Ltd.	100
Hicks Chicks Ltd.	100
Highland Bitumens Ltd.	33
Holman Michel & Co. Ltd.	100
Hydraulic Tin Ltd.	100
I.C.B. Ltd.	100
Indasco Ltd.	100
International ... and Waterways, Ltd.	100
International Metals Ltd.	100
International Refining Co. Ltd.	100
Iranian Oil Participants Ltd.	14
Iranian Oil Services Ltd.	14
Iranian Oil Services (Holdings) Ltd.	14
Iraq Petroleum Co. Ltd.	24
Jack Dean (Oils) Ltd.	100
John Church (Scarisbrick) Ltd.	100
John Voges Co. Ltd.	100
Kawecki-Billiton (U.K.) Ltd.	50
Kedjuz Holdings Ltd.	100
Kenninshall Welding & Engineering Co. Ltd.	100
King's Asphalt Ltd.	100
Laxton & Bunyard Nurseries Ltd.	100
Lenta Properties Ltd.	25
Lion Emulsions Ltd.	100
London and Thames Haven Oil Wharves Ltd.	100
C. B. Lowe (1920) Ltd.	100
Lubricants Producers Ltd.	100
Mark Smith Ltd.	100
Maryland Alloys Ltd.	100
Medway Oil & Storage Co., Ltd.	60
Metal Scrap and By-Products Ltd.	100
The Mexican Eagle Oil Co. Ltd.	100
Morning Star Foods Limited	100
Morris Ashby Ltd.	100
Mytilus Insurance Co. Ltd.	100
The New Schibaieff Petroleum Co. Ltd.	50

Name of Company	Percentage Holding
E. W. Nickerson & Sons	100
Nickerson RPB Ltd.	100
Nickerson Sugar Beet Seed Ltd.	100
The Nickerson Seed Co. Ltd.	100
Nickerson Seed Investments Ltd.	100
Nickersons Farm Seeds (1983) Ltd.	100
Nickersons Pendrith Seeds	100
Nickerson's Seeds (Wholesale)	100
Nickerson's Sugar Beet (Research)	100
Nickerson Zwaan Ltd.	100
Nickersons Seed Specialists Ltd.	100
The North Caucasian Oil Fields, Ltd.	10
North Lincolnshire Data Services Ltd.	100
*Octel Associates	37
Offshore Medical Support Ltd.	17
Old Tree (Farm Produce) Ltd.	100
Osma Plastics Ltd.	59
Overseas Coal Development Ltd.	25
Petchey (Service Station) Ltd.	100
Petro Central Ltd.	50
Petroleum Services (Middle East) Ltd.	24
Plycol Ltd.	100
Price's (China) Ltd.	100
Price's Patent Candle	100
Price's Petroleum Co. Ltd.	50
Price's (South Africa) Ltd.	100
Price's (Zimbabwe) Ltd.	100
Private Oil Holdings Oman Ltd.	85
Qatar Petroleum Co. Ltd.	24
Rebron Ltd.	100
Retread (Roads) Ltd.	100
Retread Roads (Scotland) Ltd.	100
R. E. Roberts and Sons Ltd.	100
Sabah Shell Petroleum Co. Ltd.	100
Seahorse Electronics Ltd.	100
Sea View Poultry Farms Ltd.	100
Seed Services Ltd.	100

Name of Company	Percentage Holding
Selap, Ltd.	100
Shell Aircraft Ltd.	100
Shell and BP Red Sea Trading Ltd.	50
Shell & B.P. Scotland Ltd.	60
Shell and B.P. Services Ltd.	50
Shell Antilles and Guianas Ltd.	100
Shell Chemicals U.K. Ltd.	100
Shell Composites Ltd.	100
Shell Chemical Co. Ltd.	100
Shell Chemical Co. of Central Africa Ltd.	100
Shell Chemical Co. of Eastern Africa Ltd.	100
Shell Chemical Distributing Co. Ltd.	100
Shell Chemical Services (Overseas) Ltd.	100
Shell Chemicals (Hellas) Ltd.	100
Shell Chemicals Ireland Ltd.	100
Shell Chemicals U.K. Ltd.	100
Shell China Ltd.	100
Shell Coal Enterprises Ltd.	100
Shell Coal International Ltd.	100
The Shell Co. of Bangladesh	100
The Shell Co. of Bulgaria Ltd.	100
The Shell Co. of Burma Ltd.	100
The Shell Co. of China Ltd.	100
Shell Company of Gibraltar Ltd.	100
Shell Co. (Hellas) Ltd.	100
Shell Cyprus Trading Co. Ltd.	100
Shell Deep Water Drilling Co. Ltd.	100
The Shell Co. of Hong Kong Ltd.	100
The Shell Co. of India Ltd.	100
The Shell Co. of The Islands P.L.C.	100
The Shell Co. of Kuwait	100
The Shell Co. of Latvia Ltd.	100
The Shell Co. of Lithuania Ltd.	100
The Shell Co. (Malta) Ltd.	100
The Shell Co. of Nigeria Ltd.	100
Shell Co. (Pacific Islands) Ltd.	100
The Shell Co. of Pakistan Ltd.	100

Name of Company	Percentage Holding
The Shell Co. of the Philipines Ltd.	75
The Shell Co. of Portugal Ltd.	100
The Shell Co. (Puerto Rico) Ltd.	100
The Shell Co. of Qatar Ltd.	100
The Shell Co. of Sierra Leone Ltd.	100
The Shell Co. of South West Africa Ltd.	50
The Shell Co. of Sri Lanka Ltd.	100
The Shell Co. of The Sudan, Ltd.	100
The Shell Co. of Thailand Ltd.	100
The Shell Co. of Turkey Ltd.	100
The Shell Co. of Venezuela Ltd.	100
The Shell Co. of West Africa Ltd.	100
The Shell Co. (W.I.) Ltd.	100
Shell Composites Ltd.	100
Shell East Africa Petroleum Supply Ltd.	100
Shell E.S. Enterprises Ltd.	100
Shell Ethiopia Ltd.	100
Shell Exploration (China) Ltd.	100
Shell Exploration (Libya) Ltd.	100
Shell Exploration Ltd.	100
Shell Finance Ltd.	100
Shell Finance Services Ltd.	100
Shell Gases Ltd.	100
Shell Holdings (U.K.) Ltd.	100
Shell International Chemical Co. Ltd.	100
Shell International Gas Ltd.	100
Shell International Marine Ltd.	100
Shell International Petroleum Co. Ltd.	100
Shell Lubricants (International) Ltd.	100
Shell Malaysia Ltd.	100
Shell Marine (U.K.) Ltd.	100
The Shell Marketing Co. of Borneo Ltd.	100
Shell Marketing Ltd.	80
Shell Markets (Middle East) Ltd.	100
Shell Mediterranean Ltd.	100
Shell Methane Services Ltd.	100
Shell-Mex & B.P. Ltd.	60

Name of Company	Percentage Holding
Shell-Mex and B.P. Pensions and Provident Fund Trust Ltd.	60
Shell Nuclear Ltd.	100
Shell Ocean Islands p.l.c.	100
Shell Offshore Sales (Greece) Ltd.	100
Shell Oil South West Africa Ltd.	100
Shell Oman Trading Co. Ltd.	100
Shell Overseas Chemical Trading Co. Ltd.	100
Shell Overseas Holdings Ltd.	100
Shell Overseas Services Ltd.	100
Shell Paraguay Ltd.	100
Shell Pensions Trust Ltd.	100
Shell (Petroleum Supply) Ltd.	100
Shell Property Co. Ltd.	100
Shell Red Sea Ltd.	50
Shell Research Ltd.	100
Shell Resource Development Financing Ltd.	100
Shell Southern Africa Holdings Ltd.	100
Shell Tankers (U.K.) Ltd.	100
Shell Thailand Manufacturing Ltd.	100
Shell Trading (Middle East) Ltd.	100
Shell U.K. Exploration & Production Ltd.	100
Shell U.K. Ltd.	100
Shell Uruguay Ltd.	100
Sirtica Shell Ltd.	100
Slades Trust Ltd.	100
Smith Brothers (Rochdale) Ltd.	100
Sonex Ltd.	100
Spares Distribution Services Ltd.	100
The St. Helen's Housing Co. Ltd.	100
Stybex Mouldings Ltd.	50
Sunfair Ltd.	50
Superdrive Motoring Centres Ltd.	100
Taybrite Ltd.	84
Temana Bees Ltd.	100
Temana International Ltd.	100
Temana U.K. Ltd.	100
Thames Estuary Development Co. Ltd.	18

Name of Company	Percentage Holding
Thermocomfort Ltd.	100
Trebury Property Management Co. Ltd.	52
Turkish Petroleum Co. Ltd.	24
United Kingdom Oil Pipelines Ltd.	35
Universal Plant Breeding Services Ltd.	100
The Ural Caspian Oil Corporation Ltd.	35
Vapotherm (U.K.) Ltd	100
H.R. Vaughan Ltd.	100
Vencel Holdings Ltd.	100
Vencel Resil Ltd.	100
Ward Blenkinsop and Co.	100
Ward Blenkinsop (Dublin)	100
Ward Blenkinsop Trading Ltd.	100
Wavin Ltd.	58
Wavin Overseas Ltd.	58
Wavin Pipes N.I. Ltd.	58
Wavin Plastics Ltd.	58
Western Consultancy and Technical Services (Marine) Ltd.	100
Wirtgen (G.B.)	100
Woodhill Sand Ltd.	100
UPPER VOLTA	
Grand Moulins Voltaiques	1
Petrovolta et Shell	49
Soc. Sucriere de la Haute Volte	3
URUGUAY	
Shell Uruguay	100
VENEZUELA	
Commercial Agropecuaria S.A.	100
C.A. Inversiones Shell de Venezuela	100
Quimica Venoco C.A.	15
Shell Quimica de Venezuela C.A.	100
Shell Venezuela S.A.	100
VIETNAM	
Cong-Ty Shell Vietnam	100
ZAIRE	
Soc. Shell pour le Developement Petrolier du Littoral	100
Soc. Shell Zairoise de Recherche et d'Exploitation	85

Name of Company	Percentage Holding
Zaire—Sep	5
Zaire—Shell	40
ZAMBIA	
Bitumen Products Manufacturing Co. Ltd. (Zambia)	50
Shell Chemicals (Zambia) Ltd.	100
ZIMBABWE	
Bennett Brothers (Private) Ltd.	50
Bitumen Construction Services (Private) Ltd.	50
BP & Shell Marketing Services (Private) Ltd.	50
BP Zimbabwe (Private) Ltd.	50
Canopus Marketing (Private) Ltd.	50
Central African Petroleum Refineries (Private) Ltd.	21
Chemilite-MFS (Private) Ltd.	25
Condor Investments (Private) Ltd.	50
Cougar Transport Co. (Private) Ltd.	50
Crusader Engineering (Private) Ltd.	50
Electric Installations (Private) Ltd.	50
Kime Properties (Private) Ltd.	50
K.O. Tyres (Private) Ltd.	50
Nova Lubricants (Private) Ltd.	50
Plant & Equipment (Sales) (Private) Ltd.	25
Pyramid Motor Corporation (Private) Ltd.	25
Shell Developments Zimbabwe (Private) Ltd.	100
Shell Zimbabwe (Private) Ltd.	50
Tarmacadam Services (Private) Ltd.	50
Zimbabwe Lubricants (Private) Ltd.	50

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No. 83-586

In the Supreme Court of the United States

OCTOBER TERM, 1983

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Petitioner,
vs.
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the lower courts erred in holding that Shell Petroleum N.V. lacks standing to challenge pending tax proceedings involving two of its domestic subsidiaries, Shell Oil Company and Scallop Nuclear, Inc.;

(2) Whether the lower courts erred in holding that the controversy is not ripe for adjudication because (a) no tax assessments have been issued against Scallop Nuclear, Inc., and (b) though proposed assessments for some of the years in question have been issued against Shell Oil Company, such assessments are still in the process of administrative review.

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No. 83-586

In the Supreme Court of the United States

OCTOBER TERM, 1983

SHELL PETROLEUM N. V.,
Petitioner,

vs.

MICHAEL FRANCHETTI, KENNETH CORY, WILLIAM M. BENNETT, INDIVIDUALLY AND AS MEMBERS OF, GERALD H. GOLDBERG, INDIVIDUALLY AND AS EXECUTIVE OFFICER OF, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 709 F. 2d 593.

STATEMENT OF THE CASE

Introduction

This is an action for declaratory and injunctive relief against California taxing authorities who are in the process of determining the corporate income tax liability of Shell Oil Company ("Shell Oil") and Scallop Nuclear, Inc. ("Scallop Nuclear"), two companies doing business in the State. Petitioner is Shell Petroleum N. V. ("SPNV"), a company of the Netherlands which is the parent of Shell Oil and the grandparent of Scallop Nuclear. Respondents are the members and

executive officer of the Franchise Tax Board ("Board"), the State agency which administers the California Bank and Corporate Tax Law.

The specific complaints of SPNV relate to the State's use of the unitary business/formula apportionment method of taxation recently considered by this Court in *Container Corp.* v. *Franchise Tax Board*, 103 S. Ct. 2933 (1983). This method of taxation entails the formula apportionment of corporate income derived from a unitary business conducted both within and without the State and is designed to reflect contributions of the various elements of a unitary business to the profitability of the business as an economic whole. A separate accounting approach is disfavored in such an instance because it "is subject to manipulation and imprecision, and often ignores or captures inadequately the many subtle and largely unquantifiable transfers of value that take place among the components of a single enterprise." *Container*, *supra*, at 2946; see also *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 439 (1980).

Because formula apportionment is employed to ascertain the true value of a taxpayer's in-state contributions to the profitability of the unitary business as a whole, its use does not constitute an attempt to tax extraterritorial values. SPNV obviously is unwilling to accept this basic tenet. In its Statement of the Case, it refers to "California's eight-year-long campaign *to tax the earnings of petitioner . . . and its more than 900 Royal Dutch/Shell worldwide subsidiaries and affiliates*," and represents to the Court that an underlying issue in the case is "whether the 'upstream' application of a unitary tax scheme *to reach the income of a foreign parent company and its non-United States subsidiaries and affiliates*" is unconstitutional. Petition for Writ of Certiorari (hereinafter "Pet.") at 2 (emphasis added); see also Pet. at 20 ("Shell Oil and Scallop Nuclear are mere hooks on which the Board hangs its endeavors to reach SPNV's income from foreign sources").

If SPNV's perception of the unitary business/formula apportionment method were accurate, the method would have been invalidated long ago. To the contrary, this Court has repeatedly upheld it as a reasonable and valid means of determining the amount of corporate income fairly attributable to sources within a particular taxing jurisdiction. Further, this Court implicitly recognized in *Container* that, given the existence of a unitary business, the use of formula apportionment is likely to produce results which are more

accurate than those produced by a separate accounting approach. The unitary business/formula apportionment method takes into account what has been termed "the benefits of synergy" of a unitary enterprise.[1] A separate accounting approach, even with adjustments for transactions between related corporations, ignores this element.

Relevant Facts Omitted from Petition

SPNV has failed to recite in its petition for review a number of facts which are particularly relevant to the ripeness of the controversy. By such omissions, SPNV has also placed an improper connotation on a number of facts which it relates.[2]

The Board's field audit of Shell Oil for income years 1967-1971 was commenced on October 23, 1972, when the auditor originally assigned to the Shell Oil account met with Shell Oil representatives at their office in Houston, Texas. Affidavit of Howard Maycox ("Maycox Aff."), ¶6. During that meeting, basic audit procedures were established. *Id.* Among other things, the Shell Oil representatives were advised that the question of unity between Shell Oil and the other Royal Dutch/Shell companies would have to be investigated during the course of the audit. *Id.* It was understood that the audit would consist of two phases: an audit of Shell Oil and its subsidiaries as filed on a domestic combination basis, and an investigation of the question of unity with the Royal Dutch group. *Id.*

As the first phase of the audit was nearing completion in July 1974, the Board auditor made his initial request for information pertaining to Shell Oil's immediate parent and all subsidiaries in which the parent had an interest in excess of 50 percent. *Id.*, ¶11. This

1. See Note, *Multinational Corporations and Income Allocation Under Section 482 of the Internal Revenue Code*, 89 Harv. L. Rev. 1202 (1976), 1214-1216.

2. SPNV cites *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975) as authority for the proposition that, for purposes of standing, the facts asserted in affidavits submitted on SPNV's behalf in connection with its motion for summary judgment and in opposition to the Board's motion for dismissal, as well as the facts alleged in its complaint, must be assumed to be true and construed in its favor. However, the Board opposed SPNV's motion for summary judgment on standing and ripeness grounds; a number of affidavits and exhibits were filed in support of the Board's opposition; and the District Court both granted the Board's motion to dismiss and denied SPNV's motion for summary judgment. Under such circumstances, it would seem appropriate to evaluate both the questions of standing and ripeness in view of all the materials of record. Cf., *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 109, 115 & n. 31 (1979).

request was renewed in December 1974. *Id.*, ¶13. Shell Oil declined to cooperate, advising the auditor in January 1975 that the company would not furnish information on its parent because Shell Oil's liability could be correctly determined from the records of Shell Oil alone. *Id.*, ¶16.

The parties met on February 7, 1975 and May 2, 1975 in an effort to resolve the audit dispute. *Id.*, ¶¶18, 20. At the conclusion of the second meeting, Shell Oil representatives agreed to furnish published reports for the Royal Dutch group for all audit years. *Id.*, ¶20. At the next meeting, held on August 11 and 12, 1975, they were again asked to furnish such reports. Affidavit of Sam Kashiwagi ("Kashiwagi Aff."), ¶4. They were also told that a "test check" of worldwide combination would be made. *Id.*

The auditor received the requested annual reports on September 10, 1975. *Id.*, ¶5. On April 1, 1976, he submitted schedules to Shell Oil which roughly reflected the tax consequences of a worldwide combination report. *Id.*, ¶6. He received a response from Shell Oil dated April 23, 1976, discussing other cases involving integrated oil companies. *Id.*, ¶7. By letter dated May 11, 1976, the auditor replied:

> "In accordance with *the mutually agreed approach to the problem*, we have developed figures on a multinational basis to enable your staff to appraise the situation and place it in its proper perspective before proceeding further with the examination on unity between Shell Oil Company and the other companies in the Royal Dutch/Shell group. The schedules, *reflecting your proposals to which we agreed* to [sic], were sent to you with our letter of April 1, 1976.
>
> "The determination of whether or not a group of corporations is engaged in a unitary business involves the necessity of gathering a great deal of facts and figures from various sources.
>
> "In the interest of approaching the matter from a practical standpoint, and to relieve your staff with the burden involved in obtaining such information, we advised you that in accordance with the discussion in Reg. 25120 (b)(1)(2) and our experience with other oil companies, the nature and structure of the integrated oil companies give indication of being inherently unitary under California guidelines. Consequently, we offered to forego the data gathering at this time providing you

will agree in writing not to make 'unity of operations' an issue." Supplemental Affidavit of J. Lloyd Kennedy filed on behalf of SPNV ("Kennedy Supp. Aff."), Exhibit 2 (emphasis added).

On September 7, 1976, the auditor again met with Shell Oil representatives to discuss revisions to audit schedules. Kashiwagi Aff., ¶8. At the conclusion of that meeting, he gave the Shell Oil representatives a copy of a questionnaire on unity. *Id.* A revised questionnaire was forwarded to them on September 21, 1976, along with a request that answers be submitted by December 31, 1976. *Id.* 9.[3]

The auditor thereafter maintained contact with the taxpayer, repeating his request for responses to the questionnaire. *Id.* In May 1977, he was advised that Shell Oil's tax department had made substantial progress and that the requested data would probably be available by mid-June, after top management approved its submission to the Board. *Id.*, ¶10.

The next communication was a 30-page letter dated September 6, 1977, in which Shell Oil broadly stated the reasons why, in its opinion, application of the unitary concept was inappropriate (e.g., "Intercompany sales as between Shell Oil and the Group [are] a minor part of the total sales.") *Id.*, ¶11; Exhibit 1 at 11. No effort was made to furnish such readily available information as the names and addresses of major Shell Oil committees; the names of Shell Oil officers and their prior relationships with other group companies; the details concerning Shell Oil's sharing of research personnel with group companies; and the names of major research and development projects undertaken in conjunction with other group companies. Affidavit of Richard A. Watson ("Watson Aff."), ¶14.

At the next meeting with the auditor, on September 23, 1977, Shell representatives indicated that although they had collected requested data, their letter of September 6, 1977 constituted their response to the Board's questionnaire. Kashiwagi Aff., ¶12. They stated that they did not wish to give further responses and they asked the auditor to proceed to issue notices of proposed assessments. *Id.* The auditor objected to this procedure by letter dated September 30, 1977, and he also requested an extension of the

3. The questionnaires inadvertently asked for figures on intercompany sales by dollar value for each *transaction*, rather than by dollar value for each *year*, but Shell Oil representatives never objected to that request on the ground that it was too burdensome. Kashiwagi Aff., ¶8.

statute of limitations. *Id.* His request for an extension of the statute was repeated at a meeting on October 11, 1977. *Id.*, ¶13. Shell Oil representatives replied that they would not extend the statute and they again refused to furnish further responses to the questionnaire, indicating that they were declining to do so for internal reasons. *Id.*

On October 17, 1977, the auditor, having received no response to his repeated requests for information, sent Shell Oil an official Notice and Demand for Information. *Id.*, ¶14. On December 16, 1977, having still received no response, he issued Notices of Proposed Assessments for 1967-1971, including a 25 percent penalty for failure to furnish information on notice and demand. *Id.* The proposed assessments were based upon estimates derived from figures contained in the annual reports, with all doubts resolved in favor of the Franchise Tax Board. *Id.*

The audit of Shell Oil for income years 1972-1976 was commenced on October 26, 1977. *Id.*, ¶16. A letter dated October 18, 1977, was sent to Shell Oil confirming the appointment and requesting that certain information be available for the audit. *Id.* A questionnaire about unity was enclosed.

The extended statute of limitations date for issuing any proposed assessment for the 1972 tax period was March 15, 1978. *Id.*, ¶17. Shell Oil refused to grant a further extension of the statute of limitations for this year. *Id.* The auditor thereupon sent a Notice and Demand for Information on November 10, 1977, with a due date of December 16, 1977. *Id.* Shell Oil did not supply the requested data. *Id.* Since the company also refused to extend the statute of limitations, the auditor issued a Notice of Proposed Assessment for 1972 based upon the limited information in his possession, again with all doubts resolved in favor of the Franchise Tax Board. *Id.*[4]

Each of the Notices of Proposed Assessments for the years 1967-1972 contained the notation that the assessment was being issued "*because of the pending expiration of the statute of limitations.*"

4. It is the practice of the Board to include only active corporations in a combined report, and therefore passive holding companies are excluded. (Affidavit of Howard G. Vandeberg, "Vandenberg Aff.", ¶5.) In issuing the proposed assessments, the auditor assumed that SPNV was a passive holding company, and he attempted to exclude it from the combined report. Kashiwagi Aff. ¶23. If such passive holding company income was actually included in his figures for the worldwide combined income of the Royal Dutch/Shell companies, it was because he had insufficient information to exclude it. *Id.* See also Watson Aff., ¶5.

Affidavit of J. Lloyd Kennedy filed on behalf of SPNV ("Kennedy Aff."), Exhibits 3-8 (emphasis added).

On April 10, 1978, some four months after the initial assessments with penalties were issued, the auditor was notified by telephone that Shell Oil had decided to furnish the data requested in the questionnaire on unity. Kashiwagi Aff. ¶18. On April 20, 1978, he received a letter stating that Shell Oil representatives had requested certain information from SPNV, and that they would submit answers to the questionnaire in about four weeks. *Id.*, ¶19. On May 31, 1978, he received from Latham and Watkins, attorneys for Shell Oil, a response to the questionnaire which partially answered the Board's inquiries, but did not include information on the Royal Dutch group. *Id.*[5]

The field audit of Shell Oil for income years 1973-1976 was completed in 1979, but the Board has not issued any proposed assessments against Shell Oil for that period. *Id.*, ¶20. Meanwhile, there has also been an audit of Scallop Nuclear *Id.*, ¶21. No proposed assessments have been issued against Scallop Nuclear for *any* period. *Id.*

The protests of Shell Oil to the proposed assessments for 1967-1972 have been assigned to staff counsel of the Board for review. Watson Aff., ¶2. In connection with this protest, the staff counsel is also considering the validity of the auditor's determination that additions should be made to Shell Oil's tax liability for the years 1973-1976. *Id.* At the request of representatives of Scallop Nuclear, he also has agreed to consider the validity of the auditor's determination that Scallop Nuclear is involved in a single unitary business with other companies in the Royal Dutch/Shell group. *Id.*

Prior to the filing of this lawsuit, the Board's staff counsel met with Shell Oil representatives on at least two occasions, the last meeting being held on August 31, 1981. *Id.*, ¶¶6, 7. Shell Oil has indicated interest in the possibility of a settlement. *Id.*, ¶¶6, 11. In addition, as a result of fact finding and negotiation between Shell Oil, its outside representatives, and the Board's staff, numerous issues

5. In SPNV's statement of facts, it is implied that Shell Oil "made extensive informational submissions to the Board" prior to the issuance of the Notices of Proposed Assessments for 1967-1972. See Pet. at 6. Actually, Shell Oil did not submit a meaningful response to the Board's inquiries until *after* the proposed assessments were issued, its earlier response consisting of the 30-page letter of September 6, 1977 generally objecting to unitary treatment.

have been resolved. *Id.*, ¶6. Such issues involve multi-million dollar adjustments in the proposed assessments. *Id.*

Disposition Below

SPNV's description of the proceedings below is erroneous in several particulars.

First, neither the District Court nor the Court of Appeals considered the question of standing in terms of the two sub-questions indicated by SPNV: (1) whether SPNV has standing to raise its constitutional claims, and (2) whether SPNV has standing to raise its treaty-based claims. The courts below applied the rule that a stockholder who is injured only in his capacity as a stockholder has no standing to redress a wrong to the corporation in the absence of some provision of law which explicitly or impliedly creates an individual right of action. It was concluded that the Board's actions against the two corporate taxpayers, Shell Oil and Scallop Nuclear, will not injure SPNV directly or individually, and that, contrary to SPNV's assertion, standing is not conferred on it by the Treaty of Friendship, Commerce and Navigation between the United States and the Netherlands ("the FCN treaty").[6] Pet., App. at 3a, 5a.

Second, SPNV makes the following statement, partially quoting the District Court opinion:

> "Unwilling to 'strain to read into the Treaty an implied right . . . [in SPNV] not shared by other U.S. corporations', the Court concluded that SPNV could not claim any rights under the Treaty because only 'a company of the Netherlands which itself transacts business in the United States falls within the zone of interests sought to be protected by the [Netherlands FCN] Treaty'." Pet. at 10.

What the Court actually said was that the purpose of the FCN treaties was not "to accord *to the domestic subsidiaries of foreign parents* rights not shared by other U.S. corporations (emphasis added), and thus "the court [would] not strain to read into the Treaty an implied right of action by Netherlands shareholders of U.S. companies . . . . " Furthermore, the District Court did not hold that *only* a company of the Netherlands which itself transacts business in

6. Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of The Netherlands, entered into force December 5, 1957, 8 U.S.T. 2043, T.I.A.S. No. 3942.

the United States falls within the zone of interests sought to be protected by the treaty. It said:

> "In the instant case, the treaty language upon which SPNV relies vests rights, if at all, in 'nationals and companies of the [Netherlands]'. *See* Article I(1); Article VI(3); Article XI(1), (3) and (4). It is clear that a company of the Netherlands which itself transacts business in the United States falls within the zone of interests sought to be protected by the Treaty; but it is also clear . . . that a U.S. corporation and its foreign parent are not mere extensions of each other, for Treaty purposes."

The District Court concluded, in other words, that the treaty provisions were inapplicable in this case because U.S. corporations are not companies of the Netherlands. It did not make a general holding that would exclude from all treaty protection all Netherlands companies which do not actively transact business in the United States.

Finally, the Court of Appeals did not specifically hold, as SPNV states, that the Tax Injunction Act is inapplicable to SPNV's claims.

REASONS WHY THE WRIT SHOULD BE DENIED

I

THE LOWER COURTS' HOLDINGS ON STANDING AND RIPENESS ARE FULLY CONSISTENT WITH ESTABLISHED PRINCIPLES AND THUS DO NOT PRESENT IMPORTANT QUESTIONS OF LAW WHICH NEED TO BE RESOLVED BY THIS COURT.

SPNV seeks by this petition to carry a disagreement with the State of California to this Court under the aura of importance surrounding a question left unresolved in *Container Corp.* v. *Franchise Tax Board*, 103 S. Ct. 2933 (1983). That question, of course, is whether a state's use of the unitary business/formula apportionment method of determining taxable income violates the Foreign Commerce Clause when applied on a worldwide combination basis to domestic subsidiaries of a foreign parent. A second issue presented in the case which SPNV deems to be of international concern arises from its claim that the unitary business/formula apportionment method is prohibited in this instance by Article XI, ¶4 of the Dutch FCN treaty. Additionally, SPNV claims that the decision of the Court

of Appeals has created a new issue of international concern, namely "whether the entire body of FCN treaties can be enforced in the Federal courts." Pet. at 13.

It will be demonstrated below that the only issue of any substance arising in the case is that concerning the Foreign Commerce Clause. That issue was never reached by the lower courts, however, it being determined that SPNV lacks standing to challenge the tax treatment of its domestic subsidiaries, Shell Oil and Scallop Nuclear, and, further, that the proposed tax treatment of those companies is too indefinite at this point to satisfy the requirements of ripeness. Both of those determinations are fully consistent with established principles. Accordingly, they do not present important questions of law which need to be resolved by this Court.

A. The Standing Question.

In his concurring opinion in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), Justice Stewart said that he could not then "imagine a case, at least outside the First Amendment area, where a person whose own [ ] tax liability was not affected could ever have standing to litigate the tax liability of someone else." 426 U.S., at 46 (STEWART, J., concurring). This is precisely what SPNV is attempting to do in the present case. It is not the aggrieved taxpayer. Rather, it is attempting to question the tax treatment of Shell Oil and Scallop Nuclear, two companies in which it holds an interest.[7]

1. The standing issue is whether SPNV may challenge the Board's actions against Shell Oil and Scallop Nuclear.

SPNV contends that the issue here is whether it has standing "to raise its treaty-based or constitutional claims" in Federal court. Pet. at 3; see also Pet. at 10-11. This characterization of the standing question is imprecise.

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7. As pointed out in the amicus curiae brief filed on behalf of the Government of the Netherlands (Neth. Amicus Curiae Brf. at 12), this Court noted in *Container* "that the fact the legal incidence of a tax falls on a corporation whose *formal* corporate domicile is domestic might be less significant in the case of a domestic corporation that was *owned* by foreign interests." 103 S. Ct., at 2956, n. 32 (emphasis added). The quoted remark did not relate to a question of standing. Furthermore, the described situation would hardly encompass state taxes asserted against Shell Oil, a widely-held company which has more than 30,000 stockholders in addition to SPNV.

As this Court stated in *Valley Forge College* v. *Americans United*, 454 U.S. 464 (1982), there is no barrier to the assertion of such claims in a Federal court, "[b]ut assertion of a right to a particular kind of government conduct . . . cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." 454 U.S., at 483. It is a "bedrock requirement" of a justiciable case or controversy "that a litigant have 'standing' to challenge *the action sought to be adjudicated* in the lawsuit." *Id.* at 471 (emphasis added); see also *Sierra Club* v. *Morton*, 405 U.S. 727, 731 (1972) (standing question is "whether the [complainant] has alleged facts that entitle it to obtain judicial review of the challenged action").

Thus, the issue here is not whether SPNV has standing to raise its treaty-based and constitutional claims, but whether SPNV has standing to challenge the Board's tax treatment of Shell Oil and Scallop Nuclear.[8] Indeed, the treaty-based claims of SPNV already have been considered, and they have been rejected at an early stage of the litigation on the ground that the treaty is inapplicable. The treaty provisions have necessarily come into question at this point because they bear upon SPNV's asserted entitlement to standing, as well as upon the merits of its claim that the treaty is being violated.[9]

2. SPNV lacks standing under the settled rule that only a corporation and not its stockholders can complain of injury or wrong done to the corporation.

In a rather cavalier approach, SPNV makes use of a footnote to criticize the District Court's reliance "on the fact that SPNV can be

8. Both SPNV and the Government of the Netherlands complain that it is illogical for the Board to treat SPNV and its U.S. subsidiaries as parts of a unitary enterprise, yet to deny that SPNV has standing to challenge that treatment. Pet. at 21; Neth. Amicus Curiae Brf. at 3, 11. The argument is based on the erroneous assumption that the Board has determined that SPNV and all of its subsidiaries and affiliates constitute a unitary enterprise. On the contrary, the Board has made only a preliminary determination that Shell Oil and Scallop Nuclear *may* be part of a unitary enterprise composed of the operating companies of the Royal Dutch/Shell group of companies. In addition, the argument is self-defeating. If SPNV, Shell Oil and Scallop Nuclear were to be treated as a "unit" for standing purposes, it seems clear that SPNV's action would be barred by the Tax Injunction Act. See *infra* at n. 26.

9. It is to be noted that even if SPNV has properly framed the standing question, there would remain the further question whether it has stated a claim on which relief can be granted. This again would require an examination of the treaty provisions.

characterized as a shareholder of its subsidiaries." Pet. at 20, n. 24. This, of course, is the whole point. The fact that SPNV is a shareholder attempting to enforce what is actually a corporate cause of action is a major reason its lawsuit is doomed.

The principle that only a corporation and not its stockholders can complain of injury or wrong done to the corporation has been honored by this Court since the early days of its history. See, e.g., *Davenport* v. *Dows*, 85 U.S. 626 (1874); *Hawes* v. *Oakland*, 104 U.S. 450 (1882); *Huntington* v. *Palmer*, 104 U.S. 482 (1882); see also *Forbes* v. *Memphis*, 9 F. Cases 408 (F. Case No. 4,926) (1872); *Langdon* v. *Hillside Iron & Coal Co.*, 41 F. 609 (1890).[10] The rule has just as much force today as it ever did. If the cause of action is the corporation's, the corporation is a necessary party, and relief must be sought either directly by the corporation or through a derivative action brought on its behalf. *Ross* v. *Berhard*, 396 U.S. 531, 538 (1970); *Koster* v. *Lumbermans Mutual Co.*, 330 U.S. 518, 522-523 (1947); *Meyer* v. *Fleming*, 327 U.S. 161, 167 (1946). Thus, while a stockholder may seek to vindicate rights belonging to him individually, he may not seek on his own to vindicate rights belonging to the corporate entity. See, e.g., *Gregory* v. *Mitchell*, 634 F. 2d 199, 202 (5th Cir. 1981); *Sherman* v. *British Leyland Motors, Ltd.*, 601 F. 2d 429, 439-440 (9th Cir. 1979); *Smith* v. *Martin*, 542 F. 2d 688, 690 (6th Cir. 1976), cert. den. 431 U.S. 905 (1977); *VonBrimer* v. *Whirlpool Corp.*, 536 F. 2d 838, 846 (9th Cir. 1976); *Vincel* v. *White Motor Corp.*, 521 F. 2d 1113, 1119 (2d Cir. 1975). Nor can the rule be avoided by an allegation of injuries to the stockholder which are the indirect result of wrongs against the corporation. See *Pittsburgh & W. Va. Ry.* v. *U.S.*, 281 U.S. 479, 486-487 (1930). A stockholder may bring an individual action only "where the wrong itself amounts to a breach of duty owed to the stockholder personally." *Schaffer* v. *Universal Rundle Corporation*, 397 F. 2d 893, 896 (5th Cir. 1968); see also *VonBrimer*, *supra*, at 846; *McDaniel* v. *Painter*, 418 F. 2d

10. Coincidentally, both *Davenport* and *Huntington* involved an action by a stockholder seeking injunctive relief against an assertion of taxes against the corporation in which he held an interest. In *Davenport*, this Court held that a demurrer to the complaint should have been sustained since the corporation itself was not made a party to the suit. In *Huntington*, it held that a demurrer to the complaint had been properly sustained since the stockholder had not satisfied the requirements of a derivative suit.

545, 547 (10th Cir. 1969).[11]

The cases dealing with stockholder standing constitute a line of authority separate from that dealing with standing as an Article III requirement.[12] However, the legal basis for the general rule is that a stockholder is not personally injured by a wrong done to the corporation; his rights are derivative. *Pittsburgh & W. Va. Ry.*, *supra*, at 487. Thus, if an analogy to the standing requirement of Article III is appropriate, a stockholder under such circumstances does not suffer a cognizable "injury in fact." Article III requires that "the plaintiff who seeks to invoke judicial power stand to profit in some *personal* interest." *Simon* v. *Eastern Ky. Welfare Rights Org.*, *supra*, 436 U.S., at 40 (emphasis added) see also *Warth* v. *Seldin*, *supra*, 422 U.S., at 498; *Gladstone, Realtors* v. *Village of Bellwood*, *supra*, 441 U.S., at 99. A stockholder complaining of injury to the corporation does not have a personal interest at stake even though he may be economically affected by the corporate injury. *Pittsburgh & W. Va. Ry.* v. *U.S.*, *supra*, at 487.

Furthermore, in order for standing to exist, "[t]he injury or threat of injury must be both 'real' and 'immediate,' not 'conjectural' or 'hypothetical.'" *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); see also *Simon*, *supra*, at 44-46. A finding of "injury in fact" to SPNV in the present case requires speculation not only as to the possible effects of the Board's actions upon SPNV's interest, but speculation

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11. SPNV, citing *American Power & Light Co.* v. *S.E.C.*, 325 U.S. 385, 389-391 (1945), says that this Court has recognized that a stockholder can sue individually when he suffers a unique injury. In *American*, however, the injury to the stockholder did not flow from an injury to the corporation and there was a statutory provision which specifically granted a right of review to "any person . . . aggrieved" by the challenged action. In the absence of a comparable provision of law, even a *sole* stockholder has not been permitted to sue in his own right when he has been injured indirectly in his capacity as a stockholder. See, e.g., *Sherman* v. *British Leyland Motors, Ltd.*, *supra*, 601 F. 2d at 439-400.

12. The District Court nevertheless employed Article III terminology in deciding the standing question. After stating that SPNV's allegations satisfied the "injury in fact" requirement (presumably because of the possible diminution in the value of its stockholdings), the Court went on to cite two prudential limitations on standing: the "zone of interest" limitation and the limitation which generally requires a plaintiff to assert his own legal rights and interests. It then concluded:

> "The requirement that a shareholder establish injury to rights specifically vested in it individually, distinct from those of the corporation, is undoubtedly a prudential rather than a constitutional one. It might or might not be a particular instance of the more general prudential standing principles quoted above. But in any event, the requirement must be satisfied." Pet., App. 16a, n. 6.

as to *what* actions will be taken by the Board. SPNV could hardly have asserted that there was a case or controversy in the constitutional sense when the Board's auditor was merely inquiring into the question of unity. The fact that the auditor was forced to issue proposed assessments against Shell Oil because that company refused to cooperate at the last moment should not be enough to open the courtroom doors.

Reference to what SPNV terms "traditional standing analysis," Pet. at 18, also brings SPNV face-to-face with two prudential limitations on standing: the "zone of interest" limitation and the limitation which generally requires a plaintiff to assert his own legal rights and interests. It is true, for example, that the Dutch FCN treaty provides protections to companies of the Netherlands, and that SPNV is such a company, but it does not follow that treaty protections are applicable in the present instance. For purposes of this lawsuit, SPNV is not even "arguably" within the "zone of interests" protected by the treaty provisions on which it relies if those provisions do not pertain to the assertion of taxes against Shell Oil and Scallop Nuclear.

3. The Board's actions against Shell Oil and Scallop Nuclear do not threaten any individual rights of SPNV.

a. Rights which SPNV may hold under the Dutch FCN treaty do not pertain to either federal or state taxation of domestic subsidiaries.

SPNV claims that it has standing to challenge the Board's actions against Shell Oil and Scallop Nuclear because they infringe upon SPNV's rights under the FCN treaty between the United States and the Netherlands.[13] More specifically, it contends that the Board's use of the unitary business/formula apportionment method to de-

13. In October of 1979, the Government of the Netherlands lodged an official protest with the Secretary of State, charging that the practices of the Franchise Tax Board are contrary to provisions of the FCN treaty and accepted principles of international law. See Note from Charge d'Affaires a.i. of the Netherlands to the Secretary of State dated September 18, 1979 (Affidavit of Benjamin F. Miller ("Miller Aff."), Exhibit 2). The Department of State replied that it was "not in a position to conclude that the practices complained of are inconsistent with either the standards set forth in the Treaty or general principles of international law." Letter from Secretary of State to the Ambassador of the Netherlands dated December 20, 1979 (*Id.*, Exhibit 3).

termine the tax liability of Shell Oil and Scallop Nuclear violates rights held by SPNV under Article XI, ¶4 of the treaty. SPNV also contends that the Board has infringed upon SPNV's rights under Article I, ¶1, by not according "fair and equitable" treatment to SPNV and its enterprises, and upon its rights under Article VI, ¶3, by unreasonably impairing SPNV's interests in its two subsidiaries.[14]

Article XI, ¶4 of the treaty provides that,

> "In the case of companies or nonresident nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories . . . ."

The claim that this provision prohibits the use of formula apportionment with respect to taxation even of companies of the Netherlands is strained at best; it is also contradicted by the documented history of the FCN treaties. More significant for present purposes, the further notion that the treaty imposes limitations upon the manner in which either the Federal Government or the states may tax corporations organized under the laws of this country is foreclosed by the unanimous decision of this Court in *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982).

SPNV asserts, in effect, that the Dutch and other FCN treaties long ago accomplished *sub silentio* what has been publicly debated in Congress and elsewhere for years: an outlawing of the states' use of formula apportionment in an international context. It arrives at this conclusion through the following syllogism: the separate accounting approach developed in various double taxation conventions has

14. Additionally, SPNV says that it seeks to show that informational demands of the Board violate SPNV's rights under the treaty. Pet. at 23-24. No applicable treaty provision is cited. In any event, the Board's informational demands have been directed to Shell Oil, not to SPNV, and any sanctions for failure to furnish requested information will fall on Shell Oil, not SPNV. While SPNV colorfully asserts that "Shell Oil is being held hostage to coerce SPNV to submit to the Board's demands," Pet. at 24, it is to be noted that penalties were included in the proposed assessments against Shell Oil for income years 1967-1972 after that company refused to supply even readily available information on its own operations. Once the assessments were issued, Shell Oil had a change of heart and submitted a meaningful response to the Board's inquiries. Whether the Board, under these circumstances, would see fit to impose additional penalties in any assessments for subsequent years is a matter of conjecture.

achieved the stature of international law; the modern FCN treaties are based upon principles of international law; therefore, the tax article of the FCN treaties incorporates the separate accounting requirement.

SPNV's reasoning does not survive analysis. There is no canon of international law which imposes a strict territorial limitation on the power to tax, much less a canon of international law which embodies the accounting methods developed in various tax treaties for attribution and allocation of income among nations. The accounting methods which have been adopted in the various tax treaties pertain to corporations conducting business within another country and reflect an effort to curb double taxation at the international level—a problem which results from the very fact that there is *no* international law limiting the taxing powers of a sovereign nation over persons and objects within its control.[15] Certainly, international law does not purport to dictate how a country shall tax its own citizens and residents.

Moreover, the diplomatic history of the FCN treaties negotiated by the United States, including the treaty with the Netherlands, establishes beyond any doubt that the Federal Government has regarded the "reasonably allocable or apportionable" language contained in provisions such as Article XI, ¶4 as expressing a general principle of fair attribution of income without requiring any specific method of accounting.[16] Indeed, in an annotated draft of the FCN treaty with Portugal prepared by Herman Walker, Jr., the chief architect of the modern FCN treaties, it was recognized that the "reasonably allocable or apportionable" language embraced the

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15. See Deperon, *International Double Taxation*, the Advisory Committee on Economics to the Committee on International Economic Policy, League of Nations (1945) at 6; see also *Burnet* v. *Brooks*, 288 U.S. 378, 399-400 (1933).

SPNV also exaggerates the situation when it says that the unitary method is "internationally condemned." Pet. at 22. Both the model double taxation convention issued by OECD (Organization for Economic Co-Operation and Development) in 1977 and the model convention issued by the United Nations in 1980 permit the use of formula apportionment when it has been customarily employed in a contracting state. See United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, U.N. Doc. ST/ESA/102 (1980) at 93-96.

16. See, e.g., Airgram from the Department of State to the Embassy at The Hague dated July 3, 1953 (Miller Aff., Exhibit 9); HICG Bonn Despatch No. 2255 of February 17, 1954 (*Id.*, Exhibit 8).

unitary method of taxation then used by various states of the Union.[17]

SPNV runs into even greater difficulties with its assertion that the tax article of the Dutch FCN treaty limits the manner in which the State of California may determine the tax liability of Shell Oil and Scallop Nuclear. Paragraph 4 of the article imposes limitations only on the taxation of companies of the other contracting party. The taxes in question here are not being asserted against SPNV; it is even doubtful that SPNV's income has been or would be included in the apportionment base used to determine the tax liability of Shell Oil and Scallop Nuclear. It follows that Paragraph 4 is operative in the present case only if Shell Oil and Scallop Nuclear qualify as companies of the Netherlands for purposes of the treaty, a proposition which is foreclosed by the decision of this Court in the *Sumitomo* case. There it was held that language in the FCN treaty with Japan identical to that contained in Paragraph 4 referred only "to companies of one of the Treaty countries operating in the other country," 457 U.S., at 182, and that a locally incorporated subsidiary of a Japanese company was "a company of the United States, not a company of Japan." *Id.*[18]

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17. See Annotated Draft FCN for Portugal prepared by Herman Walker, 1947-1948, at 14a (Miller Aff., Exhibit 7); see also Memorandum to the American Embassy at Chungking for Use in Negotiating Treaty of Friendship, Commerce and Navigation with China (Miller Aff., Exhibit 5); Memorandum to the American Embassy at Rio de Janeiro for Use in Negotiating Treaty of Friendship, Commerce and Navigation between the United States and Brazil (*Id.*, Exhibit 6).

SPNV erroneously asserts that the Convention of Establishment between the United States and France, entered into force December 21, 1960, 11 U.S.T. 2923, T.I.A.S. No. 4625, specifically adopts the arm's length method of accounting. Pet. at 17. The language in the French treaty permitting taxation of "income . . . derived from sources [within the taxing jurisdiction]" is equivalent to language in other FCN treaties permitting taxation of income "reasonably allocable or apportionable" to the taxing jurisdiction. Furthermore, the United States made it clear during negotiation of the treaty that it sought "[o]nly a declaration of general principle, rather than any predetermined apportionment formula," see Paris Despatch No. 2001 of April 22, 1959 (Affidavit of David R. Milton filed on behalf of SPNV ("Milton Aff."), Exhibit 5, at 3), and the Senate was assured during ratification proceedings that the French treaty contained "no innovations raising problems as to their effect upon domestic law." (S. Exec. Rep. No. 12, 86th Cong., 2d Sess. 5 (1960).)

18. Article VI, ¶1 of the FCN treaty provides that "companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activity for gain (business activities) within the territories of the other Party, whether directly or by agent or through the

Aside from the controlling precedent in the *Sumitomo* case, the notion that the FCN treaty imposes limitations on the taxation of domestic companies is totally implausible. First, as this Court recognized in *Container*, domestic companies generally are excepted from the provisions of the double taxation conventions executed by the United States. See 103 S. Ct. at 2956. It is inconceivable that the Federal Government intended to compromise its taxing powers over domestic corporations through the broader provisions contained in the tax article of the Dutch FCN treaty and others like it. Second, it is inconceivable that the Federal Government intended by Article XI, ¶4 of the treaty to confine its taxing powers over Shell Oil and Scallop Nuclear to income "reasonably allocable or apportionable" to the United States; in other words, to surrender its right to tax Shell Oil and Scallop Nuclear, as it does other domestic corporations, on their income "from whatever sources derived." 26 U.S.C. §61. Third, federal law taxes the total income of both domestic corporations and resident individuals. If Article XI, ¶4 were construed as applying to domestic corporations, an immediate schism would be created—i.e., while residents who were nationals of the Netherlands would be taxed on their total income, domestic subsidiaries of Netherlands companies would be taxed only on income "reasonably allocable or apportionable" to this country. Again, it is inconceivable that such a radical departure from internal tax policy was ever contemplated.

Finally, even as a general proposition, it would make little sense to construe Article XI, ¶4 as pertaining to domestic corporations. The purpose of the FCN treaty provisions is "to assure that corporations of one treaty party have the right to conduct business within the territory of the other party without suffering discrimination as an alien entity." *Sumitomo*, *supra*, at 188. Locally incorporated subsidiaries of foreign companies are fully protected simply because they have the status of domestic subsidiaries, and as such "are entitled to the rights . . . of other domestic corporations." *Id.*

Whether SPNV may claim standing by virtue of the FCN treaty thus boils down to whether such standing is conferred by Articles I,

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medium of any form of juridical entity." This does not imply, as SPNV would have it, see Pet. at 19, that a Netherlands company is engaged in business here simply because it holds a majority interest in a United States corporation. Nor does it imply that provisions such as Article XI, ¶4 pertain to corporations organized under the laws of this country.

¶1 and VI, ¶3. Article I, ¶1 provides that,

> "Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, *and to their property, enterprises and other interests*." (Emphasis added.)

Article VI, ¶3 provides that,

> "Neither Party shall take unreasonable or discriminatory measures that would impair the rights or interests within its territories of nationals and companies of the other Party, *whether in their capital, or in their enterprises and the property thereof*." (Emphasis added.)

Although both of the quoted provisions expressly relate to the treatment of "companies of the other Party," as does Article XI, ¶4, SPNV argues that the italicised language entitles it to complain of the Board's actions against Shell Oil and Scallop Nuclear because they are its "enterprises" in which it holds interests.

Assuming, however, that Shell Oil and Scallop Nuclear are "enterprises" of SPNV for treaty purposes,[19] it does not follow that SPNV is entitled to object to their domestic tax treatment in a Federal court. Carried to its logical extreme, it is SPNV's theory that any Dutch national owning stock in an American corporation may bring suit against the United States or one of the several states to correct what he deems to be unfair taxation of the corporation's income. The claim is untenable, particularly in view of the fact that the FCN treaty accords nationals and companies of the Netherlands *national* treatment with respect to access to the courts. See Article V, ¶1.

In addition, SPNV has never indicated what purpose would be served by permitting Netherlands stockholders to complain of "unfair" taxation of U.S. corporations, which are perfectly capable of asserting such complaints on their own. Domestic corporations partly or wholly owned by nationals or companies of the Netherlands do not stand at the mercy of the United States or any of the several states—thus threatening the "rights" of their Netherlands stockholders—merely because their Netherlands stockholders are unable to voice their discontent with domestic tax policies in a

19. Actually, the language "their . . . enterprises," as used in Article I, ¶1 and Article VI, §3 and elsewhere in the treaty, appears to refer to businesses conducted by Netherlands companies rather than to domestic companies which they may control. See, in particular, the second sentence of Article VIII, ¶1.

judicial forum. The only possible objective of a stockholder action is avoidance of the Tax Injunction Act. It is undoubtedly for this reason that the District Court, in considering the standing question, said that the "salutory purposes [of the Act] should be kept in mind." Pet., App. at 12a.

b. The tax treatment of Shell Oil and Scallop Nuclear does not involve any distinct constitutional rights of SPNV.

SPNV also says that it is attempting to assert "its" rights under the Foreign Commerce and Due Process Clauses. What those rights might be has never been clear. SPNV, after all, is a company of the Netherlands which neither does business in the United States nor has a permanent establishment here. See Pet. at 3-4, n. 5.[20]

If the Board's actions in the case involved an assertion of taxes against SPNV's stockholdings in Shell Oil and Scallop Nuclear, or some other action directed against SPNV, it might be possible for SPNV to make out a claim that rights secured to it by the Constitution were threatened. Cf., *United States* v. *Pink*, 315 U.S. 203, 228 (1942); *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 491-492 (1931). Here, however, the challenged actions of the Board are not directed against SPNV, but against Shell Oil and Scallop Nuclear. Thus, SPNV is not in the same position as the foreign entities in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), who were challenging taxes assessed against *them* with respect to *their* property.

For the first time in its Petition, SPNV also suggests that it has standing because the Due Process Clause protects it against double taxation of the worldwide income in which it has a beneficial interest. See Pet. at 21-22 & n. 26. Aside from the dubious status of SPNV under the Due Process Clause, the argument has a number of flaws. First, if it is doubtful, as SPNV states, that Shell Oil and Scallop Nuclear could complain of such double taxation because they will be presented with only one tax bill, it should be all the more doubtful that SPNV has standing to complain when it will receive no tax bill at all. Second, the earnings of SPNV's subsidiaries and affiliates are not "assets" of SPNV. See *Rhode Island Hospital Trust*

20. Cf., Exchange between the Bench and Stuart A. Smith, Office of the Solicitor General, at oral argument in *Chicago Bridge & Iron Company* v. *Caterpillar Tractor Co., et al.*, No. 81-349, April 19, 1982:

"QUESTION: We don't usually rely on foreign governments to tell us what violates the commerce clause, do we?

"MR. SMITH: That is true. . . . " (Tr. of Oral Arg. 19.)

Co. v. *Doughton*, 270 U.S. 69, 81 (1926). Third, the alleged injury to SPNV would not be unique; any stockholder of Shell Oil owning stock in another Royal Dutch/Shell company would be similarly affected. Fourth, the argument that the Due Process Clause protects against double taxation of intangibles was discarded more than 40 years ago, see, e.g., *Mobil Oil Corp.*, *supra*, 445 U.S., at 445, and the contrary theory apparently was never applied in the international context. See, e.g., *Burnet* v. *Brooks*, *supra*, 288 U.S., at 400-405. Finally, SPNV has erroneously assumed that an American parent corporation suffering the same "unique injury" would have standing to complain of the Board's actions. For reasons already explained, this is simply not the case. See *supra, at 11-14.*

If the Board should finally determine that either Shell Oil or Scallop Nuclear are part of a unitary enterprise, and issue final assessments on that basis, it may be that such assessments will be open to challenge on the Due Process ground that they attribute to California an amount of income out of all proportion to the taxpayer's activity within the state. Obviously, either Shell Oil or Scallop Nuclear would be able to attack any assessment on this ground. Either would also be free to complain that the tax assessments are invalid under the Foreign Commerce Clause.[21]

4. The lower courts properly declined to read the treaty provisions as creating an implied right of action in SPNV.

The lower courts declined to read into the FCN treaty an implied right of action in SPNV, the Court of Appeals tersely stating:

"A domestic corporation holding a majority interest in Shell Oil or Scallop would not have standing in this case as the injury

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21. The same would be true of any claims of invalidity based on provisions of the FCN treaty. In oral argument before the District Court, counsel for the Board made a statement to the effect that, if Shell Oil and Scallop Nuclear were to challenge any tax assessments against them in the state courts, the Board would argue, as it has done throughout the federal litigation, that the FCN treaty does not apply to the taxation of domestic corporations. The fact that California would take that adversary position obviously would not preclude the treaty claims from ever being raised. See Neth. Amicus Curiae Brf. at 4; see also Pet. at 24-25. It also bears repeating that the District Court and Court of Appeals have not prevented *SPNV* from asserting rights under the treaty. The search for a distinct, individual injury sufficient to entitle SPNV to have standing to complain of actions against the corporate taxpayers has necessitated a consideration of the treaty provisions on which SPNV relies. Those provisions have been found not to vest any rights in SPNV in the present situation.

> complained of is not direct or individual. The Treaty places SPNV in the same position as a domestic corporation: it has no standing." Pet., App. 5a.

SPNV excitedly claims that the rationale employed by the Court "has threatened to undermine the entire complex of FCN treaties into which this nation has entered." Pet. at 13. This charge is based on what SPNV conceives to be the Court of Appeals' determination that the treaty "provides solely for national treatment." *Id.*

The Court of Appeals was, of course, dealing with the standing question. It held, in this regard, that SPNV is entitled to no greater rights than a U.S. corporation under similar circumstances. That reasoning is unassailable in view of the fact that nationals and companies of the Netherlands are granted, under the very treaty on which SPNV relies, *national* treatment with respect to access to the courts.

It should be evident that this standing determination does not threaten any absolute substantive protections which the treaty may grant to companies of the Netherlands. To use SPNV's example, if the State of California were attempting to confiscate SPNV's interest in Shell Oil or Scallop Nuclear without just compensation, there would be a threatened invasion of a legal right held by SPNV under the treaty. The fact that a U.S. corporation might not be entitled to just compensation under the same circumstances would have no bearing upon SPNV's ability to seek relief in a court of law, just as a citizen or resident may resort to the courts to redress a legal injury. The problem here is that SPNV does not have the substantive protections it claims; there is no treaty provision which imposes limitations on the taxation of domestic corporations in which a company of the Netherlands holds an interest. Consequently, SPNV has no greater right to complain of such taxation than would a U.S. company owning a similar interest.

B. The Ripeness Question.

The case or controversy requirement set forth in Article III of the Constitution demands that the issues sought to be adjudicated in a lawsuit be "ripe" for judicial resolution. This means that the harm asserted must have "matured sufficiently to warrant judicial intervention." *Warth* v. *Seldin*, *supra*, 422 U.S., at 490, n. 10. With particular reference to administrative action, the basic rationale "is to prevent the courts, through avoidance of premature adjudication,

from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging party." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967).

In the present case, the Court of Appeals accurately described both Shell Oil and Scallop Nuclear as being "in early phases of the administrative proceedings." Pet., App. at 6a. The Board has issued *no* assessments against Scallop Nuclear. It has issued only *proposed* assessments against Shell Oil for only some of the years in question, and then only because of the taxpayer's lack of cooperation. From the inception of the audit, it was understood that the question of unity would have to be pursued. After repeated requests for information, and as the statute of limitations was about to expire for the 1967-1972 tax periods, representatives of Shell Oil declined to furnish any meaningful response to the Board's inquiries, though much of the information was within their own knowledge and control. They also refused to extend the statute of limitations. The auditor assigned to the Shell Oil account accordingly had no choice; he was forced to protect the revenue by issuing proposed assessments which not only treated Shell Oil as part of a unitary enterprise, but resolved all other doubts in favor of the Board. It is these assessments which SPNV has the temerity to call "the conclusion of the audit process." Pet. at 29.

The issuance of the proposed assessments did, of course, provoke a formal protest by Shell Oil. That protest has been assigned to a staff counsel for the Board, who is reviewing the unitary question with respect to both Shell Oil and Scallop Nuclear.[22] Multi-million dollar reductions in the assessments already have been proposed as the result of the administrative review which has not yet been completed. Meanwhile, it has not been finally determined what, if any, additional taxes are owed by Shell Oil or Scallop Nuclear—or even whether Shell Oil, Scallop Nuclear and the other Royal Dutch/Shell companies constitute a unitary enterprise. Assuming

22. Since no assessments at all have been issued against Scallop Nuclear, there has been no occasion for it to pursue any of the administrative remedies prescribed by statute. The legal counsel for the Board who has been assigned to review the protests of Shell Oil has agreed, with the consent of the agency, to consider the unity question with respect to Scallop Nuclear prior to issuance of an assessment. See Watson Aff., ¶2.

the taxpayers are dissatisfied with the ultimate determination, they may, if they wish, pursue further administrative remedies before the State Board of Equalization.[23]

SPNV nevertheless insists that the present controversy is ripe for adjudication when viewed against the two considerations deemed pertinent in the *Abbott* case—i.e., "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S., at 49.

SPNV states that it has satisfied the first part of this analysis because "the issues raised by SPNV's complaint present purely legal questions." Pet. at 28. This is not entirely accurate. For example, in pvragraph 54 of the complaint, SPNV alleges that "[d]uring the relevant period neither [Shell Oil nor Scallop Nuclear] was engaged in an integrated business with any of the more than 900 Royal Dutch/Shell companies," certainly a mixed question of law and fact. More importantly, a court generally decides legal issues in a concrete factual setting, not in the abstract. Here, the factual circumstances are uncertain and in a state of flux; indeed, as a result of the administrative proceedings still underway, the issue of unitary treatment could very well be resolved in the taxpayers' favor, thus mooting the entire controversy.

The lack of ripeness is reflected in SPNV's own argument. It says, for example, that one of the basic issues in the case is: Does unitary taxation *as asserted* by California violate SPNV's rights under the Netherlands FCN treaty?" Pet. at 28 (emphasis added). Does SPNV mean "as asserted" in the proposed assessments against Shell Oil? Obviously not, since SPNV's complaint demands judgment "enjoining defendants . . . from proceeding with any further assessments against Shell Oil . . . using the Royal Dutch/Shell companies as the unitary reporting body." Prayer of Complaint, subparagraph (4). SPNV, therefore, must be referring to *any* tax which might be asserted under the unitary theory. But how could a court possibly determine that *any* such tax, regardless of amount, would be so "unfair" as to be invalid under Article I, ¶1 of the treaty?

Equally unavailing is SPNV's argument that the hardship to the parties of withholding court consideration is substantial. For one thing, SPNV says, the proposed assessments against Shell Oil have

23. In the alternative, either taxpayer could pay the asserted liability, file a claim for refund, and then proceed directly to the California courts if no action were taken on its claim within six months. See Cal. Rev. & Tax. Code §26103a.

forced the initiative on the taxpayer. While this is true, it is water over the dam, the proposed assessments having been issued some six years ago. Secondly, it is claimed that "SPNV is threatened with immediate harm because it has been and will continue to be coerced to produce vast quantities of information at great expense." Pet. at 29. Tiresome as it may sound, SPNV has not been asked, begged or coerced by the Board to do anything. The harm which SPNV envisions is based on its own supposition that, unless information on the Royal Dutch/Shell companies is forthcoming, additional penalties will be asserted against Shell Oil for subsequent years. No such threat has been made by the Board.[24]

SPNV also attempts to establish error below by asserting that the Court of Appeals "has created a requirement of exhaustion of remedies in contravention of this Court's longstanding rule that a plaintiff need not exhaust state administrative and judicial remedies before bringing suit under 42 U.S.C. §1983." Pet. at 26. It cites, in particular, the recent decision of this Court in *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982), and says that such a requirement of exhaustion is especially inappropriate when the remedies must be pursued by another party. Contrary to what the Court of Appeals seemed to believe, it continues, the policies of the Tax Injunction Act do not warrant "this aberrational interpretation of the ripeness doctrine." Pet at 25.

In *Patsy*, this Court reaffirmed the general rule that exhaustion of state administrative remedies is not required in actions brought under 42 U.S.C. §1983.[25] *Patsy*, however, was not a state tax case; this is. As pointed out in the concurring opinion in *Fair Assessment in Real Estate Ass'n. Inc.* v. *McNary*, 454 U.S. 100 (1981), the exhaustion of state administrative remedies has long been regarded as a precondition to a federal suit challenging the validity of a state tax. It was stated:

> "... while this Court has repeatedly reaffirmed that exhaustion of administrative remedies is not a precondition to

24. Similarly, the claim that "the Board has had all information needed to make a unitary decision with respect to Shell Oil and certain non-United States Royal Dutch/Shell companies for over five years," Pet. at 28, n. 34, is an unwarranted assumption of SPNV. The Board's investigation of unitary ties between Shell Oil and other group companies was halted for several years after settlement discussions with Shell Oil began; it has not been completed.

25. In the present case, it is even questionable whether jurisdiction was properly invoked under the section. See *supra* at 20-21.

a suit brought under the Civil Rights Acts [citations omitted], that conclusion rests firmly on the understanding that such was the intention on Congress in enacting §1983. * * *Where the obligation to require exhaustion of administrative remedies may be fairly understood from congressional action, or is in accord with congressional policy, not only is §1983 no bar, but the federal courts should be alert to further these policies.

"We plainly have sufficient evidence of such congressional policy here. * * * [T]he administrative-exhaustion requirement is entirely consonant with the principal purposes of the [Tax Injunction] Act: to provide assurance that federal courts exercise at least the same restraint in dealing with questions of state tax administration as the courts of the State that levied the tax. Where administrative remedies are a precondition to suit for monetary relief in state court, absent some substantial consideration compelling a contrary result in a particular case, those remedies should be deemed a precondition to suit in federal courts as well." 454 U.S., at 136-137 (BRENNAN, J., concurring).

The relief sought in *Fair Assessment* was money damages. Where, as in this case, the plaintiff seeks injunctive and declaratory relief, it seems clear that the policies underlying the Tax Injunction Act should be accorded particular respect. The fact that the plaintiff has no administrative remedies to pursue because he is not the taxpayer strongly suggests that he has no business in court in the first place. In any event, to require such a plaintiff to wait out the administrative proceedings that involve the actual taxpayer does not seem too much to ask.[26]

As final support for the argument that the pendency of state administrative proceedings should be disregarded in this case, both SPNV and amicus curiae cite *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). SPNV characterizes the case as standing for the proposition that "a district court may assert jurisdiction and determine the power of an administrative agency before the agency has completed its proceedings when the

26. From the outset of this litigation, the Board has argued that SPNV's suit is barred by the Tax Injunction Act. The purposes of the Act obviously are frustrated if it is read as permitting a stockholder to challenge a state tax assessment when the corporate taxpayer directly concerned is barred from doing so. This is especially true once it has been determined that the stockholder has no independent rights to assert.

controversy 'has aroused vigorous protests from foreign governments and created international problems for [the United States] Government.'" Pet. at 29 (brackets in original). However, the narrow question presented in *McCulloch* was whether the review provisions of the National Labor Relations Act constituted an exclusive remedy for challenging an action of the National Labor Relations Board which was allegedly beyond its authority. Thus, it was not the pendency of administrative proceedings which was of concern, but the statutory prerequisite to judicial review of an administrative order. As the District Court properly recognized here, *McCulloch* does not stand for the broad proposition that a Federal court may "brush aside doctrines of nonjusticiability merely because the subject of an action affects overseas interests." Pet., App. at 23a.

II
EXPEDITED CONSIDERATION OF THE CONSTITUTIONAL CLAIMS WOULD BE INAPPROPRIATE.

Asserting that this case "cries out [for adjudication]... in the most expeditious manner possible," Pet. at 30, SPNV suggests in closing that, if its petition be granted, the Court should consider directing the parties to brief the underlying issues. SPNV's petition comes at a time, however, when the possible accommodation of competing demands of the states and various foreign entities has been entrusted to a specially created Presidential commission. The present efforts of the Executive Branch to find a workable solution to the sensitive issues raised by worldwide apportionment would seem to caution against the expedited judicial consideration sought here, even if it should be determined that the lower courts erred on the questions of standing and ripeness.

Following this Court's decision in *Container*, considerable pressure was exerted on the Government of the United States to support Container's petition for rehearing.[27] President Reagan, reportedly commenting that "Federal intervention in state tax matters is objectionable in principle,"[28] rejected that proposal in favor of the establishment of a Working Group to explore the use by the

27. See Wall Street Journal (Western Ed.), September 28, 1983, at 8, col. 2.

28. See The Sacramento Bee, September 14, 1983, at A 13, col. 1.

states of the worldwide unitary method of taxation. This group, chaired by Secretary of the Treasury Donald T. Regan, is charged with producing recommendations "that will be conducive to harmonious international economic relations, while also respecting the fiscal rights and privileges of the individual states."[29]

The accommodation sought by the Administration entails just the sort of balancing process in which this Court has found itself ill-equipped to engage. As pointedly observed in *Container*, "This Court has little competence in determining precisely when foreign nationals will be offended by particular acts, *and even less competence in deciding how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please*." 103 S. Ct., at 2955 (emphasis added).

Compounding the problem is the fact that the results of the study underway presumably will be utilized by the Chief Executive to decide whether there should be a *change* in this country's foreign policies with respect to state taxation of income. In its dealings with foreign nations, the Federal Government to date has not deemed it essential that the states follow its lead even in the taxation of foreign companies. As this Court noted in *Container*, the tax treaties between the United States and various foreign countries do not cover the taxing activities of the states. *Id.*, at 2956. Indeed, the United States has formally stated its reservations to provisions in model double taxation conventions issued by OECD and the United Nations which would apply the terms of such conventions, including their preference for the separate accounting/arm's length method of allocation, to taxes imposed by political subdivisions.[30] As this Court also noted in *Container*, Congress has thus far refrained from imposing limitations on the state's taxation of income, and an effort to include a restrictive provision in the 1978 double taxation convention with Great Britian failed to receive Senate approval. 103 S. Ct., at 2956. Finally, the Federal Government has been solicitous of the state's taxing powers in drafting the tax articles of the modern FCN treaties, which apply to the states as well as to the Federal Gov-

29. See Statement of Donald T. Regan, Secretary of the Treasury, September 23, 1983, reproduced in the accompanying Appendix A. Also reproduced in the Appendices are a press release announcing the names of those invited to serve on the Working Group and a second release announcing the final membership. Although Shell Oil was among the invitees, it apparently declined to participate.

30. See United Nations, *Model Double Taxation Convention*, supra, at 49.

ernment. The United States has taken the position that language such as that contained in Article XI, ¶4, of the Dutch FCN treaty (restricting the taxation of income to that amount "reasonably allocable or apportionable" to the taxing jurisdiction) is intended to state a general principle of fair allocation without specifying the means by which the states are to accomplish that result.[31]

In sum, the United States has heretofore given a negative answer to the inquiry whether a state's lack of conformity with the Federal Government's method of taxing the income of foreign corporations is impermissible "because it '[ ] impair[s] uniformity in an area where federal uniformity is essential'" and "'prevents the Federal Government "from speaking with one voice" in international trade.'" *Container*, at 2955. Surely, if there is to be a fundamental shift in policy, and in particular, a curtailment of state taxing powers over *domestic* corporations, that action must be initiated by Congress or the Executive Branch, not this Court. In addition, the factual development in this case is woefully inadequate to serve as a framework for the second inquiry under the Foreign Commerce Clause: whether the application of the unitary concept on a worldwide basis to Shell Oil and Scallop Nuclear would create an

31. See *supra*, at 16-17. Of the do uments made available to the parties by the Department of State, those pertaining to the FCN treaty with West Germany (which, incidentally, was being negotiated at the same time as the treaty with the Netherlands) best spell out the views of the United States on the subject. When the two countries had entered into a double taxation convention, the Germans had expressed their desire that its provisions apply to taxes levied by the individual states as well as the Federal Government. The Germans again raised that issue during the negotiation of the FCN treaty. The U.S. negotiators informed them that it was the *policy* of the United States to enter into binding commitments only with respect to federal taxes, and that,

> "... taxation, within the framework of the FCN treaty, was considered in terms of non-discriminatory and equitable treatment. It was not the intention of the United States to go beyond this purpose and determine what specific formulas the individual states had to adopt in order to achieve this aim." HICG Bonn Despatch No. 2255 of February 17, 1955 (Miller Aff., Exhibit 8).

The further suggestion that this Court solicit the views of the United States on the propriety of granting SPNV's petition raises an interesting specter. If the United States were to declare its disagreement with the Government of the Netherlands that Article XI, ¶4 of the Dutch FCN treaty "incorporates the internationally accepted arm's length principle with respect to domestic subsidiaries of foreign companies," Neth. Amicus Curiae Brf. at 6, it would appear that this Court would be ousted of jurisdiction to decide the question since the treaty itself provides that interpretative differences which cannot be resolved through diplomacy shall be referred to the International Court of Justice. See Article XXV, ¶2.

impermissible risk of double taxation. What, if any, additional taxes will finally be asserted by California against either of those companies is not even known.[32]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

November 10, 1983

Respectfully submitted,
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32. This Court pointed out in *Container* that "Whether the combination of [the arm's length and formula apportionment] methods results in the same income being taxed twice or in some portion of income not being taxed at all is dependent solely on the facts of the individual case." 103 S. Ct., at 2952. SPNV takes issue with that view, saying that, as stated by Justice Powell in the dissenting opinion, "'double taxation is inevitable' under California's unitary tax system, as applied in the international context." Pet. at 21. On at least two occasions however, Shell Oil representatives have informed a California legislative committee that application of the unitary concept to the Royal Dutch/Shell group may actually reduce Shell Oil's tax liability to California in the long run. See Testimony of John Walker, reproduced in California's Bank and Corporation Tax Vol V, *Interim Hearing on Unitary Method of Taxation*, Assembly Revenue and Taxation Committee (1980) at 98; Letter of E.M. McCracken, Jr., dated August 28, 1980, reproduced in California's Bank and Corporation Tax Vol. IV, *Unitary Method of Apportionment: A Second Look*, Assembly Revenue and Taxation Committee (1980) at 34.

Appendix A

TREASURY NEWS
Department of the Treasury • Washington, D.C. • Telephone 566-2041

Statement by Donald T. Regan
Secretary of the Treasury
September 23, 1983

President Reagan decided to refrain from filing a motion for rehearing in the Container Corporation case and to establish a Working Group composed of representatives of the Federal government, state governments, and the business community. This Group will explore the state's use of the worldwide unitary method of taxation.

In order to develop policies to resolve the complex issues involved, I will establish the high level Working Group called for in the President's decision.

This group, which I will chair, will be charged with producing recommendations in a relatively short time that will be conducive to harmonious international economic relations, while also respecting the fiscal rights and privileges of the individual states. The Working Group will consider the views of our trading partners who are seriously concerned about this issue.

The challenge to this body will be formidable. However I am confident a fair and workable solution can be found to this sensitive and emotional tax issue.

[Text reprinted to conform to type-size requirements.]

FACT SHEET

Working Group on Worldwide Unitary Taxation

The Working Group, which will include representatives from the federal government, state governments, and the U.S. business community, will explore state use of the worldwide unitary method of taxation. The Working Group's objective will be to develop a federal policy that is conducive to harmonious international economic relations while respecting the fiscal rights and privileges of individual states.

Based on a detailed Cabinet-level review, the Administration has concluded that this issue can be solved only by a cooperative effort of the affected parties. The tri-partite Working Group will give a full and complete hearing to all sides of the issue and will consider the views of our trading partners who are seriously concerned about this issue. The Working Group will be charged with developing a broadly-acceptable solution.

In its review, the Working Group will consider the following issues:

(1) A consistent and appropriate definition of a unitary business;
(2) The application of the three-factor formula in an international context, including its impact on international income flows;
(3) Uniform rules and standards to alleviate administrative burdens while respecting state fiscal sovereignty;
(4) An equitable resolution to the problems raised by foreign governments and foreign-based multinationals;
(5) The treatment of intercorporate dividends;
(6) Federal-state sharing of tax information, including transfer pricing adjustments;
(7) Uniform reporting requirements and joint state audits;

(8) The desirability of federal legislation implementing the above; and

(9) The possibility of convening a conference with our trading partners to receive their views and recommendations.

The worldwide unitary method of taxation is used by about 13 states to determine the taxable income of a business operating across state and national borders. Under this approach, income from related corporations, whether domestic or foreign, is combined to determine the worldwide taxable income of the unitary business. A portion of this worldwide taxable income is then attributed to the unitary state on the basis of in-state business activity relative to total or worldwide business activity. If, for example, one-third of the worldwide business activity, generally measured by sales, payroll, and property, occurs in the unitary state, one-third of the worldwide taxable income would be attributed to that state. The worldwide unitary method is different from the separate accounting or "arm's-length" method used by other states, the federal government, and most foreign countries. Under this approach, a state taxes a multinational corporation by allocating income among related corporations according to "arm's-length" or unrelated party prices.

September 23, 1983

Appendix B

TREASURY NEWS

Department of the Treasury • Washington, D.C. • Telephone 566-2041

FOR IMMEDIATE RELEASE
Friday, September 30, 1983

CONTACT: Charles Powers
556-2041

Statement by Treasury Secretary Donald T. Regan on Unitary Taxation

Secretary of the Treasury Donald T. Regan has invited representatives of all groups involved in the states' use of the worldwide unitary method of taxation to a meeting at the Treasury Department on October 7, 1983.

The purpose of this *informal discussion* is to produce constructive ideas and suggestions *for the development of* the *official working group* on unitary taxation.

President Reagan last week asked the Treasury Secretary to establish and chair a high-level working group to explore and attempt to resolve the complex issues involved in the unitary method of taxation.

[List of invitees and telegram of invitation attached.]

[Text reprinted to conform to type-size requirements.]

President Reagan has asked me to establish a high-level working group to explore and attempt to resolve the complex issues involved in the states' use of the worldwide unitary method of taxation. This group, which I will chair, will be composed of representatives of the federal government, state government, and the business community. Its mission is to develop as quickly as possible a federal policy conducive to harmonious international economic relations while respecting the fiscal rights and privileges of individual states, their need for revenues, as well as considering the views of our trading partners.

In order to explore the issues involved, I would like to invite you to attend a meeting on Friday, October 7, 1983, from 10:30 a.m.-12 noon in room 4426 at the Treasury Department. It is my hope that this informal discussion, which will include representatives of all the groups involved, will produce constructive ideas and suggestions for an official working group on unitary taxation. A letter of confirmation follows.

Please contact Assistant Secretary of the Treasury Bruce Thompson at (202) 566-8191 regarding your acceptance and detailed arrangements.

Donald T. Regan

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Appendix C

TREASURY NEWS

Department of the Treasury • Washington, D.C. • Telephone 566-2041

FOR IMMEDIATE RELEASE
October 28, 1983

CONTACT: Charles Powers
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Treasury Announces Membership of Worldwide Unitary Taxation Working Group

Secretary of the Treasury Donald T. Regan today announced the membership of the Worldwide Unitary Taxation Working Group. This group, composed of representatives of the federal government, state governments, and the business community, will advise the Treasury and assist in the development of a policy dealing with the complex issues involved in the states' use of the worldwide unitary method of taxation.

The first public meeting of the Working Group, which will be chaired by Secretary Regan, will be held on Wednesday, November 2, 1983, at 10:30 a.m. in the Cash Room of the Treasury Department. Charles E. McLure Jr., Deputy Assistant Secretary of the Treasury (Tax Analysis), will serve as the Group's Staff Director. The members of the Working Group are as follows:

Mr. John R. Opel
Chairman and Chief
Executive Officer
International Business
Machines
Old Orchard Road
Armonk, New York 10504

The Honorable
James Thompson
Governor of Illinois
Springfield, IL 61706

Mr. Philip Caldwell
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The Honorable
George Deukmejian
Governor of California
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Mr. Edmund T. Pratt, Jr.
Chairman
Pfizer, Inc.
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Mr. Robert E. Gilmore
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Mr. Charles I. McCarty
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The Honorable
Scott Matheson
Governor of Utah
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Washington, D.C. 20004

Mr. David E. Nething
National Conference of State Legislatures
444 North Capitol Street
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Washington, D.C. 20001

Mr. Lee Moffitt
Speaker of the Florida House
Florida State Capitol
Room 420
Tallahassee, Florida 32301

Mr. John B. Tucker
Speaker of the New Hampshire House
16 Edwin Street
Claremont,
New Hampshire 03743

The following federal government representatives will assist the Chairman:

The Honorable
John Chapoton
Assistant Secretary
(Tax Policy)
U.S. Treasury Department

The Honorable
W. Allen Wallis
Under Secretary for
Economic Affairs
Department of State

The Honorable
John A. Svahn
Assistant to the President
for Policy Development
The White House

Mr. Robert B. Hawkins, Jr.
Chairman
Advisory Commission
on Intergovernmental
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DEPARTMENT OF THE TREASURY

Office of the Secretary

WORLDWIDE UNITARY TAXATION WORKING GROUP ESTABLISHMENT AND MEETING NOTICE

Pursuant to the Federal Advisory Committee Act (PL. 94-463) the Department of the Treasury announces the establishment and a meeting of the Worldwide Unitary Taxation Working Group.

The Working Group, composed of representatives of the Federal government, state governments, and the business community, will advise and assist in the development of a policy dealing with the complex issues involved in the states' use of the worldwide unitary method of taxation. It is in the public interest that this tax issue affecting our individual states and our trading partners be resolved in a fair and workable manner by a cooperative effort of the affected parties.

The Working Group will meet at *10:30 A.M.* on November 2 in the Cash Room of the Main Treasury Building. The purpose of the meeting is to define the work plan and develop a time frame for deliberations. The agenda includes the following topics for discussion:

1. A consistent and appropriate definition of a unitary business.
2. The application of the three-factor formula in an international context, including its impact on international income flows.
3. Uniform rules and standards to alleviate administrative burdens while respecting state fiscal sovereignty.
4. An equitable resolution to the problems raised by foreign governments and foreign-based multinationals.

5. The treatment of intercorporate dividends.
6. Federal-state sharing of tax information, including transfer pricing adjustments.
7. Uniform reporting requirements and joint state audits.

Inquiries concerning the Working Group should be addressed to Charles McLure, Room 3108, Main Treasury, 15th & Penn., N.W., Washington, D.C. 20220, Telephone 566-2563.

John E. Chapoton
Assistant Secretary
(Tax Policy)

Dated: Oct. 2, 1983

Office - Supreme Court, U.S.
FILED
NOV 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-586

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SHELL PETROLEUM N.V.,

Petitioner,

—against—

MICHAEL FRANCHETTI, KENNETH CORY, WILLIAM M. BENNETT, INDIVIDUALLY AND AS MEMBERS OF, AND GERALD H. GOLDBERG, INDIVIDUALLY AND AS EXECUTIVE OFFICER OF, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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November 25, 1983

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No. 83-586

IN THE

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OCTOBER TERM, 1983

SHELL PETROLEUM N.V.,

Petitioner,

—against—

MICHAEL FRANCHETTI, KENNETH CORY, WILLIAM M. BENNETT, INDIVIDUALLY AND AS MEMBERS OF, AND GERALD H. GOLDBERG, INDIVIDUALLY AND AS EXECUTIVE OFFICER OF, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

Introductory Statement

The brief of respondents ("the Board") in opposition to the petition attempts to confuse a relatively simple question. Petitioner Shell Petroleum N.V. ("SPNV"), a Netherlands company, claims to have standing to invoke the provisions of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of The Nether-

lands (the "Netherlands FCN Treaty")[1] to remedy the unique injuries that SPNV itself has sustained as a result of the Board's conduct. As the lower courts have held, SPNV has in fact sustained actual injury from the Board's efforts to combine the income of SPNV and its more than 900 worldwide subsidiaries and affiliates with the income of its United States subsidiaries, Shell Oil Company ("Shell Oil") and Scallop Nuclear Inc. ("Scallop Nuclear"), for purposes of applying California's unitary corporate franchise tax. (Appendix to Petition at 3a, 16a.) The question remaining is whether SPNV falls within the zone of interests to be protected by the Netherlands FCN Treaty. The petition shows that SPNV, a company of The Netherlands, not merely "arguably" but plainly falls within the class to be protected by the Treaty. (Petition at 18-21.) Consequently, under the decisions of this Court, SPNV has standing under the Netherlands FCN Treaty to challenge the Board's efforts to apply California's unitary corporate franchise tax upstream to reach the income of SPNV and its overseas subsidiaries and affiliates. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).[2]

Direct Injury to SPNV

Attempting to skirt the result compelled by traditional standing analysis, the Board has argued that SPNV is in reality

---

[1] Entered into force December 5, 1957, 8 U.S.T. 2043, T.I.A.S. No. 3942.

[2] SPNV also claims that it has standing to challenge the Board's actions under the Foreign Commerce Clause, U.S. Const. art. I, § 8, cl. 3. California's efforts to reach a foreign parent company such as SPNV inevitably result in substantial double taxation. *See Container Corp. of America v. Franchise Tax Bd.*, 103 S.Ct. 2933, 2959 (1983) (Powell, J., dissenting). This double taxation burden is an injury unique to SPNV (and its parent companies) and furnishes another independent source of standing for SPNV to challenge California's unrelenting effort to apply its unitary taxation law to reach SPNV's assets. (Petition at 21-23 & n. 26.)

only seeking to remedy injuries to Shell Oil and Scallop Nuclear and derivatively to assert the rights of those companies. That is simply not the case.

The reality is that SPNV is seeking to redress injuries sustained *directly by it. First,* the Board has for over eight years attempted to include in the combination, apportionment and taxation process the income of SPNV, as well as the income of its foreign subsidiaries and affiliates.[3] The Board seeks to reach "upstream" from the nominal taxpayers, Shell Oil and Scallop Nuclear, and in economic effect tax hundreds of millions of dollars of income of the Royal Dutch/Shell companies for the years in question—more income, in fact, than the total consolidated income collectively earned everywhere by Shell Oil and Scallop Nuclear for that period, and income which did not accrue to either Shell Oil or Scallop Nuclear. (Petition at 20-21.) *Second,* the asserted tax liability would also effectively result in substantial double taxation that SPNV alone would face. (Petition at 21-22 & n.26.) *Third,* the Board has also effectively imposed substantial and onerous information demands on SPNV; although directed at the nominal taxpayers, the demands ask for information that only SPNV and its other overseas subsidiaries or affiliates can provide. The Board has coerced SPNV itself to comply with such demands by imposing multimillion dollar fines on Shell Oil when that company did not produce information it did not possess and could not obtain. (Petition at 23-24.)

SPNV is seeking to assert rights and protections *accorded to SPNV* under the Netherlands FCN Treaty. SPNV is not attempting to raise any treaty or other rights of Shell Oil or Scallop Nuclear. It has invoked the provisions of the Treaty that expressly protect companies of The Netherlands engaged in trade or other gainful pursuit in the United States, directly or "through the medium of any form of lawful juridical entity".

---

[3] Contrary to the Board's apparent assertion (Respondents' Brief at 6 n.4, 17), the record is clear that the income of SPNV, as well as its more than 900 overseas subsidiaries and affiliates, is included in the Notices of Proposed Assessment issued by the Board. (Heeneman Aff. ¶ 9; McCutcheon Aff. ¶ 2; Kennedy Aff. ¶¶9 & 11.)

Art. VII, ¶ 1. Similarly, SPNV is seeking to invoke *its own right* under the Foreign Commerce Clause of the United States Constitution to be free from the double taxation that inevitably flows from the Board's efforts to impose its unitary tax upstream.[4] While it is true that both Shell Oil and Scallop Nuclear are also adversely affected by the Board's unrelenting effort to impose California's corporate franchise tax on a worldwide unitary basis, the Board's effort has uniquely affected and injured SPNV.[5]

The fallacious assumption by the Board and the lower courts that SPNV is seeking to invoke the legal rights of its subsidiaries has led to a complete misreading of this Court's opinion in *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176 (1982). That case held that a United States subsidiary was not a "company of Japan" for purposes of the Japanese FCN Treaty; it dealt with neither the rights of a foreign parent company under the Treaty, *id.* at 189-90 n.19, nor the substantive protections of the Treaty. Whatever effect *Sumitomo* might have on the rights of Shell Oil and Scallop Nuclear to invoke the taxation provisions of the Netherlands FCN Treaty, that decision does not preclude SPNV from asserting rights accorded by the Treaty *to SPNV* as a company of The Netherlands.

---

[4] *See supra* n.2. The Board does not respond to SPNV's claims under the Foreign Commerce Clause. Rather, the Board attempts to mischaracterize SPNV's arguments as being based on the Due Process Clause. (Respondents' Brief at 21.) While it is true that the Due Process Clause may well be offended by the level of actual taxation arising from the Board's unitary position, SPNV has clearly grounded its double taxation arguments on the Foreign Commerce Clause. (Petition at 21-23.)

[5] Notwithstanding the Board's effort to mischaracterize SPNV's position, SPNV does not argue that shareholders of a corporation may bring a direct action for injury to the corporation. Rather, SPNV has argued that it has sustained unique injuries different from those to the corporation (and all other shareholders) and thus has standing to seek redress for those injuries independent of the corporation. *See, e.g., American Power & Light Co. v. S.E.C.,* 325 U.S. 385, 389-91 (1945); *Harmsen v. Smith,* 542 F.2d 496, 500-01 (9th Cir. 1976); *Empire Life Ins. Co. v. Valdak Corp.,* 468 F.2d 330, 335 (5th Cir. 1972).

Effect on Treaties

The Board's brief also fails to face up to the ultimate impact the decision below would have if it is allowed to stand. The decision of the Court of Appeals has in effect read out of the Netherlands FCN Treaty all protections for companies of The Netherlands save the right to national treatment. Unless reversed, that radical limitation on the substance of the Treaty will necessarily have the effect of eviscerating all 21 of the treaties of Friendship, Commerce and Navigation entered into by the United States after World War II. The adverse international ramifications of the lower court's ruling cannot be overstated.

The issues in this case are deemed of great importance by major trading partners of this country. Not only has the government of The Netherlands filed a brief *amicus curiae* with this Court in support of SPNV, but the governments of all ten countries of the European Communities—Belgium, Denmark, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands and the United Kingdom—have sought leave to file a brief *amici curiae* urging this Court to grant SPNV's petition.[6] That action is to our knowledge without precedent. In any government there is a natural reluctance to become involved in judicial proceedings in other countries. That not one, but ten, governments are moved to take that step in this case is strong support for SPNV's position that the impact on foreign commerce and international relations of the lower court's misinterpretation of the Netherlands FCN Treaty requires prompt judicial resolution of the issues presented.[7]

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[6] It became necessary for the ten countries of the European Communities to seek leave of this Court to present their views in this matter because the Board refused to consent to such filing.

[7] The references by the Board in its brief to the Working Group chaired by the Secretary of the Treasury, Donald T. Regan, are interesting in that they reflect that the United States government recognizes that the use of the worldwide unitary method of taxation presents a domestic political problem that must be addressed. Nevertheless, the establishment of that Working Group does not touch on

The Board also purports to state the views of the Federal government on the meaning of Article XI, ¶ 4 of the Netherlands FCN Treaty as it relates to the question of standing. (Respondents' Brief at 16-18, 28-29.) SPNV has amply demonstrated in the record below the documentary support for its interpretation of Article XI, ¶ 4 (*see, e.g.*, Milton Aff. Exs. 1-8; Appendix to Memorandum in Support of Plaintiff's Motion for Summary Judgment; Sherfy Aff. ¶¶ 3-5), and that view is fully supported by the government of the Kingdom of The Netherlands, one of the two signatories to that Treaty. (*See, e.g.*, Memorandum *Amicus Curiae* of the Kingdom of the Netherlands (filed in district court) at 8-37; Supplemental Memorandum of the Kingdom of the Netherlands (filed in district court) at 1-8.) Any doubt as to the Federal government's position on whether SPNV is within the zone of interests of the Netherlands FCN Treaty can be resolved by inviting the views of the Solicitor General—something the Board apparently fears. (Respondents' Brief at 29 n.31.)[8]

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the issues of SPNV's standing or the ripeness of its claim, which are the matters squarely before this Court. Moreover, the Working Group does not address (nor is it competent to do so) the basic issue underlying this case, that is, whether the upstream imposition by a state of unitary taxation on a worldwide basis on United States subsidiaries and their foreign parents violates applicable existing FCN treaties or the United States Constitution. Indeed, the issues to be considered by the Working Group as set forth in the Fact Sheet attached as Appendix A to the Board's brief do not include or refer to that basic issue.

[8] The Board argues that SPNV's interpretation of the Treaty cannot be correct because it is "inconceivable" the Federal government would "surrender its right" to tax Shell Oil and Scallop Nuclear as domestic corporations on their "total income". (Respondents' Brief at 18.) The simple fact is that SPNV's interpretation does not require any such "surrender". The Federal government already taxes both Shell Oil and Scallop Nuclear on their income "from whatever source derived", 26 U.S.C. § 61 (1967), and the Federal government does not—and cannot—engage in that taxation by upward combination with and apportionment of the income of SPNV and its worldwide affiliates. *See, e.g.*, 26 U.S.C. § 482 (1978); Convention between the United States of America and the Kingdom of The Netherlands with Respect to Taxes on Income and Certain Other Taxes, entered into force December 1, 1948, 62 Stat. 1757, T.I.A.S. No. 1855, as amended by the Supplementary Convention, entered into force July 8, 1966, 17 U.S.T. 896, T.I.A.S. No. 6051, Art. II, ¶ 1(i)(A) & (F); Art. III, ¶¶ 1 & 2.

Ripeness

The issues raised by SPNV in this case are whether the application by California of unitary taxation to the income of SPNV and its foreign subsidiaries and affiliates violates the rights of SPNV under the Netherlands FCN Treaty and the United States Constitution. Hypothetical future adjustment by the Board of figures or amounts with respect to particular items or claims relating to the taxation of Shell Oil and Scallop Nuclear (or, for that matter, the taxation of any other United States subsidiary of a foreign parent) does not affect in the slightest the basic issue of whether the Board has the legal right to impose unitary taxation on an upstream worldwide basis on a United States subsidiary and its foreign parent. The Board has for eight years maintained and continues to maintain that it has such a legal right,[9] despite the provisions of the Netherlands FCN Treaty and the Constitution.

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[9] The Board has argued that Shell Oil's refusal to extend the statute of limitations forced its hand and that, therefore, it had to issue Notices of Proposed Assessment ("NPAs") to Shell Oil. (Respondents' Brief at 23.) What the Board fails to explain is why Shell Oil was obligated to extend the statute of limitations and provide the Board with further excuses for the Board's dilatory behavior.

The Board attempts to portray a flexible position on the part of the Board and a fluid state of affairs between the Board and Shell Oil. (Respondents' Brief at 7-8, 23-24.) In point of fact, the Board has remained adamant for over eight years on treating Shell Oil, Scallop Nuclear and all other Royal Dutch/Shell companies as unitary, even though all information available to Shell Oil responsive to the Board's questionnaire has been provided and no further questions concerning the business relations of Shell Oil and other Royal Dutch/Shell companies for the tax years in question have been posed by the Board. (Petition at 28 n. 34; Kennedy Supp. Aff. ¶ 11.) The Board cites to a conference with representatives of Shell Oil in August 1981 (Respondents' Brief at 7), yet in the intervening two years there have been no new NPAs or any other concrete shift in the Board's position.

The simple fact is that the Board has issued NPAs to Shell Oil and determined and communicated to Shell Oil and Scallop Nuclear the amount of back taxes each company allegedly owes. Thus, a concrete amount of money is at stake in the litigation, an amount that will not be significantly altered, if at all, unless in a truly astounding about-face the Board suddenly changes its position of over eight years that upstream unitary taxation is appropriate.

The injury to SPNV from postponing judicial review of this case is apparent. The Board's actions have effectively placed SPNV on the horns of a dilemma that can only be alleviated by prompt adjudication of the treaty and constitutional issues at stake. Either SPNV can stand on its rights not to comply with the Board's burdensome and extraterritorial information demands, and run the proven risk of seeing enormous penalties imposed upon its subsidiaries, or it can comply with the information demands at tremendous expense and be forced to abandon its rights under the Netherlands FCN Treaty and the United States Constitution not to furnish such information. Since the legal issues raised by the Board's assertion of a right to impose worldwide unitary taxation upon SPNV and its subsidiaries and affiliates will in no way be affected by further administrative proceedings in California, and only substantial harm to SPNV can result from delayed adjudication of those legal issues, this case is surely ripe for judicial review. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission,* 103 S. Ct. 1713, 1720-22 (1983); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-49 (1967).[10]

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[10] The Board has devoted a large portion of its brief to reciting its view of "facts" that are largely irrelevant. SPNV will not address those factual assertions except to point out that the Board has presented *its* interpretation and SPNV has refuted that interpretation. SPNV respectfully refers the Court to the affidavits filed by SPNV in the district court.

Conclusion

The Board's attack on standing and ripeness is merely a device to prevent the challenge asserted by SPNV from ever being heard. If this Court accepts those arguments, Shell Oil and Scallop Nuclear will be forced to proceed with California state administrative and judicial proceedings in which SPNV cannot participate. The Board has already announced its intention to seek to deny Shell Oil and Scallop Nuclear the right to raise the treaty rights relied on by SPNV in those proceedings, asserting that Shell Oil and Scallop Nuclear are not companies of The Netherlands protected by the Treaty. Thus, a denial of certiorari by this Court will not only deny SPNV any forum in which it may assert its own treaty rights, but may well deprive SPNV entirely of any adjudication and enforcement of its rights under the Netherlands FCN Treaty.

The Board has devoted a large portion of its brief to arguing the merits of SPNV's claims under the Netherlands FCN Treaty. This focus on the merits demonstrates that purely legal issues are present in this case, issues that are ripe for adjudication. It is clear even from the Board's brief that the decision of the lower court is far too simplistic an evaluation of the Treaty to be allowed to stand. Moreover, nine sovereign nations have expressed to this Court their concern that the decision of the court below is seriously at odds with their own interpretation of their FCN treaties with the United States. It is thus apparent that this petition presents novel and important questions of Federal law requiring this Court's attention.

For the reasons set forth above and in SPNV's petition, the petition for a writ of certiorari should be granted.

November 25, 1983

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No. 83-586

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SHELL PETROLEUM N.V.,
Petitioner,
v.

MICHAEL FRANCHETTI, KENNETH CORY, WILLIAM M. BENNETT, Individually and as Members of, and GERALD H. GOLDBERG, Individually and as Executive Officer of, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE GOVERNMENTS OF BELGIUM, DENMARK, FRANCE, THE FEDERAL REPUBLIC OF GERMANY, GREECE, IRELAND, ITALY, LUXEMBOURG, THE NETHERLANDS, AND THE UNITED KINGDOM (THE MEMBER STATES OF THE EUROPEAN COMMUNITIES) AS AMICI CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

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Petitioner,

v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF FOR THE GOVERNMENTS OF BELGIUM, DENMARK, FRANCE, THE FEDERAL REPUBLIC OF GERMANY, GREECE, IRELAND, ITALY, LUXEMBOURG, THE NETHERLANDS, AND THE UNITED KINGDOM (THE MEMBER STATES OF THE EUROPEAN COMMUNITIES) AS AMICI CURIAE

Pursuant to Rule 42 of the Rules of this Court, the Governments of the member states of the European Communities hereby move this Court for leave to file a brief

as *amici curiae* in this case. Counsel for petitioner has consented to the filing of the attached brief, by a letter that has been filed with the Clerk of the Court. The consent of counsel for respondents was requested but refused.

This Court has indicated that the appropriate way for foreign governments to assert their interests in pending judicial proceedings is through the submission of briefs as *amici curiae.** As set forth in pages 1-3 of the attached brief, the Governments of the member states of the European Communities have a strong interest in the disposition of the petition for certiorari in this case. This motion and the attached brief are timely filed in accordance with Rule 36.1 of the Rules of this Court.

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November 10, 1983

* *See* Letter from Michael Rodak, Jr. to Wade H. McCree, Jr. (Apr. 17, 1978); Letter from Wade H. McCree, Jr. to Michael Rodak, Jr. (Sept. 6, 1978), in *Zenith Radio Corp. v. United States*, No. 77-589.

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INTEREST OF AMICI CURIAE

This brief is submitted on behalf of the Governments of the member states of the European Communities as *amici curiae*. There are ten member states—Belgium, Denmark, France, the Federal Republic of Germany,

Greece, Ireland, Italy, Luxembourg, the Netherlands, and the United Kingdom. The Netherlands submitted a brief as *amicus curiae* in this case on October 17, 1983. The other nine member states, having subsequently decided also to present their views to the Court, hereby join in the views expressed in the Netherlands brief, with the following further statement in which the Netherlands also joins. The decision below not only will affect the interests of the ten member states, but also may affect their relations with the United States, which of course are based on reciprocity.

The member states of the European Communities are among the major trading partners of the United States.[1] Businesses headquartered in the member states account for over $61 billion—approximately 60 percent—of all foreign direct investment in the United States.[2] Direct investment by U.S. firms in countries of the European Communities totals over $78 billion, or 35 percent of all U.S. direct investment abroad.[3]

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[1] The European Communities comprise three organizations of countries—the European Economic Community, the European Coal and Steel Community, and the European Atomic Energy Community. *See* European Communities, *European Community Facts* 4-8 (1981).

[2] Bureau of Economic Analysis, United States Department of Commerce, *Foreign Direct Investment in the United States in 1982*, 63 Survey of Current Business 31, 36 (Aug. 1983, No. 8). That total investment position is broken down as follows:

	(Millions)
Belgium and Luxembourg	$ 2,424
France	4,671
W. Germany	8,181
Italy	949
Netherlands	21,446
Denmark, Ireland, and Greece	275
United Kingdom	23,334

Id.

[3] Bureau of Economic Analysis, United States Department of Commerce, *U.S. Direct Investment Abroad in 1982*, 63 Survey of Current Business 14, 24 (Aug. 1983, No. 8).

Eight of the other nine member states are parties to treaties with the United States that are similar to the United States-Netherlands Treaty of Friendship, Commerce and Navigation involved in this case ("Netherlands FCN Treaty").[4] The decision below, denying standing to a Netherlands company to invoke the protection of the Netherlands FCN Treaty, seriously weakens the enforceability of each of those treaties and thus threatens the achievement of their important commercial objectives.

In addition, the petition for certiorari raises the issue of the standing of a foreign company to invoke the jurisdiction of U.S. courts to protect rights it asserts under the U.S. Constitution and customary international law. All of the member states have an interest in the resolution of that issue, apart from any treaties they have with the United States.

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[4] *See* Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, 14 U.S.T. 1284, T.I.A.S. No. 5432; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, 12 U.S.T. 908, T.I.A.S. No. 4797; Convention of Establishment, Nov. 25, 1959, United States-France, 11 U.S.T. 2398, T.I.A.S. No. 4625; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, United States-Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, 1 U.S.T. 785, T.I.A.S. No. 2155; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, 63 Stat. 2255, T.I.A.S. No. 1965, *as amended by* Supplemental Agreement, Sept. 26, 1951, 12 U.S.T. 131, T.I.A.S. No. 4685; Treaty of Friendship, Establishment and Navigation, Feb. 23, 1962, United States-Luxembourg, 14 U.S.T. 251, T.I.A.S. No. 5306; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942.

The only exception, the United Kingdom, has a commercial treaty with the United States that became effective in 1815. Although its provisions differ from the more recent treaties, it too mandates "reciprocal liberty of Commerce." *See infra* note 11.

SUMMARY OF ARGUMENT

The lower courts' denial of standing to petitioner threatens to vitiate important provisions of the Netherlands FCN Treaty and similar treaties between the United States and eight other members of the European Communities. Under the ruling below, the very entities those provisions were negotiated to protect—companies of one treaty party engaged in gainful pursuit in the territory of the other treaty party—cannot enforce those rights in the courts of the other treaty party. Reciprocal rulings by foreign courts would weaken the ability of American companies to obtain judicial protection for their investments abroad.

The denial of standing to raise claims under the U.S. Constitution and general international law will have equally harmful effects. It will leave foreign parent companies, which bear the ultimate burden of double taxation caused by the unitary method, unable to challenge the lawfulness of that burden.

By preventing adjudication of the lawfulness of state unitary taxation of foreign-based enterprises—and other asserted violations of the reciprocal rights granted under FCN treaties and under international law—the ruling below may discourage mutual trade and investment between the United States and the amici member states. It may also lead other nations to conclude that the United States no longer supports the international consensus that has been built through years of effort in favor of the arm's-length method of taxation. If a denial of review by this Court encourages departures from the carefully established international tax order, all nations that benefit from that order will be harmed, regardless of the nationality of the investors that are immediately affected.

ARGUMENT

Petitioner sought to litigate in the courts below a question of great concern to the Governments of the member states of the European Communities: whether a state of the United States may apply its unitary tax method to the incomes of a foreign parent company, its U.S. subsidiaries, and the parent's affiliates in other foreign countries. The member states of the European Communities have expressed their opposition to that unitary tax approach in five joint diplomatic notes to the U.S. Government since 1980.[5] In those communications, the member states have pointed out that the state unitary approach is incompatible with the arm's-length method of allocating income that is used by the U.S. Government and virtually all other nations. They have argued that, unless all major trading nations employ the same basic method of calculating taxable income, it will be impossible to achieve a coherent framework for international trade and investment. Individual members of the European Communities and other governments, such as those of Canada and Japan, have voiced similar concerns in individual communications to the U.S. Government.[6]

In refusing to adjudicate petitioner's claims, the lower courts raised further issues of concern to the members of the European Communities. The courts ruled that, because petitioner engages in activities in the United States through a U.S.-incorporated subsidiary, it has no standing to challenge California's tax practice, under either the Netherlands FCN Treaty or other applicable laws. That ruling prevents adjudication of the lawfulness of the challenged unitary tax practice; it bars companies of the amici member states from invoking the protection of U.S. courts to vindicate any other constitutional and treaty rights; and it threatens to disrupt the international con-

[5] The notes are reproduced in Annex A to this Brief.

[6] *See* Pet. App. 64a-89a.

sensus respecting the manner in which international business activities are to be taxed.

I. The Ruling Below Threatens To Vitiate Important Provisions of the Nine FCN Treaties Between European Community Countries and the United States

As noted above, nine of the member states of the European Communities have entered into post-war treaties with the United States to establish reciprocal protections for their commercial relations. All eight of the other treaties contain provisions similar to the articles of the Netherlands FCN Treaty that petitioner asserts are violated by California's application of its worldwide unitary tax. And each of the provisions specifically protects "companies of" one treaty party with respect to their investments in the territories of the other treaty party.[7]

By denying petitioner—concededly a "company of" the Netherlands—standing to challenge California's practice under the Netherlands FCN Treaty, the lower courts seriously weakened that treaty and the similar treaties to which the member states are parties. For each treaty, the lower courts' ruling means that, when a company based in a member state of the European Communities engages in trade in the United States through a U.S. subsidiary rather than a branch, that company has no right to invoke U.S. judicial protection for the rights the treaty purports to confer on its investments and enterprises. At the same time, this Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano*[8] appears to deny to the U.S. subsidiary itself any right to invoke the treaty,

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[7] Annex B to this Brief lists the relevant provisions of the nine FCN treaties that are in force between the amici curiae and the United States. The United States has, in all, 21 modern FCN treaties that contain comparable provisions. *See* Brief of the Government of the Kingdom of the Netherlands, Annex C (filed Oct. 17, 1988).

[8] 457 U.S. 176 (1982).

because it is not a "company of" the foreign treaty partner. Whether the asserted harm is impermissible taxation, as here, or another form of unreasonable treatment, the treaty apparently cannot be invoked by the parent or the subsidiary.

Such a rule robs the treaties of much of their effect. Local subsidiaries are, and have long been, the predominant form of direct foreign investment for both U.S. and European firms. In 1982, about 89 percent of all U.S. direct investment in Europe was through locally incorporated affiliates, and 94 percent of all European direct investment in the United States took that form.[9] The treaties purposely and expressly protect the use of local subsidiaries as well as unincorporated branch offices.[10] To deny the protections of the treaties for investments through local subsidiaries on grounds of "standing" thus conflicts with the express language of the treaties. It also frustrates the treaties' purpose of establishing a framework of legal protections for commercial relations between the parties.

The FCN treaties are founded on principles of mutuality and reciprocity. In most respects they extend identical rights and impose identical duties on both sides. If the tribunals of the nine member states that are parties to the FCN treaties were to reciprocate by construing them as narrowly as the courts below, American companies and their subsidiaries in those member states would be unable to enforce their rights under the treaties, and the treaties themselves would become virtual dead letters.[11]

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[9] *See* Bureau of Economic Analysis, United States Department of Commerce, *U.S. Direct Investment Abroad in 1982*, 63 Survey of Current Business 14, 16 at Table 2 (Aug. 1983, No. 8); *Foreign Direct Investment in the United States in 1982*, 63 *id.* at 31, 32 at Table 3.

[10] *See* Netherlands FCN Treaty art. VII(1) and comparable provisions listed in Annex B.

[11] The United Kingdom is the one member state of the European Communities that is not a party to a modern FCN treaty with

II. The Ruling Below Prevents Foreign Companies From Invoking the Protections of the U.S. Constitution and Customary International Law for Their Investments in the United States

The courts below also declined to consider petitioner's claims that California's unitary tax practice violates the U.S. Constitution and customary international law. Although acknowledging that petitioner has alleged injury in fact sufficient to present a justiciable controversy,[12] the courts apparently concluded here too that petitioner, as a "mere shareholder" of its U.S. subsidiaries, did not have standing to sue.

The member states believe that this ruling essentially disregards the injury that California's practice inflicts on petitioner as a foreign-based parent company. California in this case seeks to impose a tax based on the incomes of a Netherlands parent company and its worldwide affiliates—incomes that are not owned either directly or indirectly by the U.S. subsidiaries that are subject to California's jurisdiction. Such a "serious divergence" from the "accepted international practice"[13] will inevitably result in international double taxation, whose effect will

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the United States. The commercial treaty between the two nations dates back to 1815 and lacks the specificity of the more recent treaties. However, it does have an article of establishment, which mandates "reciprocal liberty of Commerce" between the two countries and provides that "generally the Merchants and Traders of each Nation respectively shall enjoy the most complete protection and security for their Commerce but subject always to the Laws and Statutes of the two countries respectively." Convention to Regulate Commerce, July 3, 1815, United States-United Kingdom, art. first, 8 Stat. 228, T.S. No. 110. *See* United States Department of State, *Treaties in Force* 178 (Jan. 1, 1988).

[12] *See* Pet. App. 3a, 16a n.6.

[13] *Container Corporation of America v. Franchise Tax Board*, 108 S. Ct. 2268, 2951-52 (1988); *id.* at 2957 (Powell, J., dissenting).

be felt uniquely by the parent company, not its U.S. subsidiaries. Only the income of the parent is being taxed twice—once in the country where it (or its foreign affiliates) do business, and again in California under the unitary method. The foreign parent therefore should have standing to seek a determination whether California may lawfully tax income that the U.S. subsidiary has not earned and in which it has no ownership interest.

Denial of that standing impairs the security of all foreign investments made in the United States through subsidiaries—with respect to taxation and any other form of governmental action whose lawfulness a foreign company may seek to challenge. And, again, reciprocal rulings by foreign tribunals would weaken the ability of American companies to invoke judicial protection of their investments in foreign lands. Investment in both directions would inevitably be discouraged.

Denying petitioner access to the courts can only exacerbate the international tension created by the unitary tax issue. The prospect that foreign companies will avoid investing in unitary tax states, or remove their investments from such states, is already real.[14] Frustration over the failure to resolve the issue is already leading to proposals for foreign retaliation, such as the bill recently proposed by some members of the British Parliament described in the Netherlands brief.[15] If the rulings below are not corrected, these unfortunate trends may accelerate.

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[14] An executive of Sony Corporation of America has been quoted as saying, "We are seriously considering whether we should move everything that can be moved out of California to South Carolina, where there is no unitary worldwide tax." Lewin, *Unitary Tax Scope Widens*, N.Y. Times, Oct. 18, 1983, at D2, col. 1.

[15] Brief for the Government of the Kingdom of the Netherlands at 15 & n.31 (filed Oct. 17, 1983).

III. The Ruling Below May Disrupt the International Consensus Regarding the Manner in Which International Business Activities Are To Be Taxed

The international community has endeavored for decades to create an international tax system that avoids barriers and distortions and gives adequate protection to international trade and investment. In multilateral discussions since 1928, a consensus has emerged—among developing as well as industrialized countries—in favor of the arm's-length principle of taxation.[16] The member states and the United States have contributed actively to these endeavors.

The unitary approach to taxation of foreign-based enterprises runs counter to this consensus and may be the beginning of its disruption. A refusal by this Court to review the decision below would effectively block any prompt resolution of the underlying question in the American courts. The resulting uncertainty might lead the international community to conclude that the United States has ceased to speak with one voice and thus is no longer contributing to the international tax order toward which the United States, the member states, and other nations have worked for so many years. Some nations—industrialized or developing—may follow California's practice

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[16] Since the League of Nations first began considering methods of allocating income of multijurisdictional businesses in 1928, the model conventions for the avoidance of double taxation adopted by that institution, the Organization for Economic Cooperation and Development, and the United Nations have specifically considered and rejected formula apportionment in favor of the arm's-length method. *See* United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, arts. 7(2), 9(1), U.N. Doc. ST/ESA/102 (1980); OECD Comm. on Fiscal Affairs, *Model Double Taxation Convention on Income and on Capital*, arts. 5(7), 7(1), 7(2), 9(1) (1977); OECD Comm. on Fiscal Affairs, *Draft Double Taxation Convention on Income and Capital*, arts. 5(6), 7(1), 7(2), 9, OECD Doc. C(63)87 (1963); League of Nations Fiscal Comm., *London and Mexico Model Tax Conventions*, League of Nations Doc. C.88.M.88.1946.II.A. (1946).

if the conflict with the developed international consensus is not resolved soon. Such a danger of disruption of the international consensus through inaction is a matter of great concern to the member states, irrespective of whether the negative impact falls immediately on their own investors in the United States or on U.S. investors in their countries.

CONCLUSION

For these reasons, the member states of the European Communities respectfully submit that this Court should grant the writ of certiorari.

Respectfully submitted,

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November 10, 1983

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ANNEXES

ANNEX A

DIPLOMATIC CORRESPONDENCE FROM THE MEMBER STATES OF THE EUROPEAN COMMUNITIES TO THE U.S. GOVERNMENT CONCERNING STATE UNITARY TAXATION

AMBASCIATA D'ITALIA

Washington, D.C.

The Italian Embassy presents its compliments to the Department of State and, on behalf of the Nine EEC Governments, of which the Italian Government has now the presidency, it has the honor to forward the attached Note on the problems of the unitary method of taxation.

The Italian Embassy welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

[SEAL]

Washington, D.C.
March 19, 1980

To the

Department of State
Washington, D.C.

UNITARY TAXATION

1. Our Governments are concerned about the application to US subsidiaries of foreign companies of the unitary basis of taxation as applied in California and in varying degrees by certain other States.

2. The unitary basis makes no attempt to examine the profits generated by the subsidiary. It looks to the

total profits of the worldwide operations of the group of which the subsidiary is a part, and claims a portion of those profits on the basis of the assumption that certain specified factors, such as the fixed asset values, turnover and payroll, affect the profits of the subsidiary in the same way and to the same extent as the profits of the group as a whole, irrespective of where the corporations of the group operate. This means that, whenever the group as a whole makes a profit the subsidiary will be taxed on a portion of this profit, even if the subsidiary is actually making a loss, or in the reverse situation, that the subsidiary may not be taxed if the group as a whole has made a loss, although the subsidiary is actually in a profit making position.

3. This method is incompatible with the principles accepted by all OECD member states and recommended to all states as a basis for the taxation of subsidiaries or permanent establishments of foreign enterprises. These principles require that a subsidiary should be taxed only on the profits it actually has made, provided that these are based on dealing at "arm's length" between the subsidiary and related enterprises, i.e. that the transactions between the subsidiary and related corporations are on the same or on a comparable basis as transactions between wholly independent parties. This is intended to arrive at a fair measure of profit and rule out artificial pricing between members of the group for the sole purpose of minimizing tax liability.

4. Unless the same basic rules for calculating taxable profits are followed generally by the main trading nations it will be impossible to achieve the essential objective of providing a consistent and coherent international tax framework for trade and investment.

5. The unitary tax basis can give rise to obviously inequable tax liabilities, and to a form of double taxa-

tion which often cannot be relieved, or can be relieved only if countries, which follow generally accepted practices, bear an unfair burden of relief.

6. Unitary taxation, because it requires worldwide reporting of the group's activities in the state where the subsidiary operates imposes very heavy compliance costs, in addition to the costs of compliance and reporting for non-US corporations in their "home countries".

7. The Federal Government uses the arms-length basis for its taxation of subsidiaries of foreign corporations.

8. The problem was addressed in the US/UK Double Taxation Treaty. Article 9(4) of the Treaty, which was supported by the Administration, would have disallowed the imposition of unitary taxes on subsidiaries of UK companies. When the Senate voted on the Treaty in 1978 the majority approved the Treaty with Article 9(4) in its original form, although the necessary two-thirds majority was not achieved. Subsequently, the Senate approved the Treaty with the necessary two-thirds majority, but subject to the reservation that Article 9(4) was not to apply for the purpose of state taxation. Article 9(4) remained in the Treaty, but only for the purpose of national taxation.

9. There are currently four relevant bills in Congress. S983, S1688, HR 5093 and HR 5076, the last of which is scheduled for hearings on the 31st of March.

In the view of the strong arguments against unitary taxation, our Governments urge you to support this legislation in so far as it relates to the unitary tax issues raised above, with a view to early enactment.

Washington, D.C.
March 19, 1980

Note No. 211

Her Britannic Majesty's Embassy present their compliments to the Department of State and, on behalf of the Ten EEC Governments, of which the British Government has now the Presidency, have the honour to forward the attached Note on the problems of the unitary method of taxation.

The British Embassy avail themselves of this opportunity to renew to the Department of State the assurrances of their highest consideration.

[SEAL]

30 October 1981

BRITISH EMBASSY

WASHINGTON

Attached: Note.

UNITARY TAXATION

1. Our Governments are concerned about the application to US subsidiaries of foreign companies of the unitary basis of taxation as applied in California and in varying degrees by certain other States.

2. The unitary basis makes no attempt to examine the profits generated by the subsidiary. It looks to the total profits of the worldwide operations of the group of which the subsidiary is a part, and claims a portion of those profits on the basis of the assumption that certain specified factors, such as the fixed asset values, turnover and payroll, affect the profits of the subsidiary in the same way and to the same extent as the profits of the group as a whole, irrespective of where the corporations of the group operate. This means that, whenever the group as a whole makes a profit the subsidiary will be taxed on a portion of this profit, even if the subsidiary is

actually making a loss, or in the reverse situation, that the subsidiary may not be taxed if the group as a whole has made a loss, although the subsidiary is actually in a profit making position.

3. This method is incompatible with the principles accepted by all OECD member states and recommended to all states as a basis for the taxation of subsidiaries or permanent establishments of foreign enterprises. These principles require that a subsidiary should be taxed only on the profits it actually has made, provided that these are based on dealing at "arm's length" between the subsidiary and related enterprises, i.e. that the transactions between the subsidiary and related corporations are on the same or on a comparable basis as transactions between wholly independent parties. This is intended to arrive at a fair measure of profit and rule out artificial pricing between members of the group for the sole purpose of minimizing tax liability.

4. Unless the same basic rules for calculating taxable profits are followed generally by the main trading nations it will be impossible to achieve the essential objective of providing a consistent and coherent international tax framework for trade and investment.

5. The unitary tax basis can give rise to obviously inequitable tax liabilities, and to a form of double taxation which often cannot be relieved, or can be relieved only if countries, which follow generally accepted practices, bear an unfair burden of relief.

6. Unitary taxation, because it requires worldwide reporting of the group's activities in the state where the subsidiary operates, imposes very heavy compliance costs, in addition to the costs of compliance and reporting for non-US corporations in their "home countries".

7. The Federal Government uses the arms-length basis for its taxation of subsidiaries of foreign corporations.

8. The problem was addressed in the US/UK Double Taxation Treaty. Article 9(4) of the Treaty, which was supported by the Administration, would have disallowed the imposition of unitary taxes on subsidiaries of UK companies. When the Senate voted on the Treaty in 1978 the majority approved the Treaty with Article 9(4) in its original form, although the necessary two-thirds majority was not achieved. Subsequently, the Senate approved the Treaty with the necessary two-thirds majority, but subject to the reservation that Article 9(4) was not to apply for the purpose of state taxation. Article 9(4) remained in the Treaty, but only for the purpose of national taxation.

9. There are currently two relevant bills in Congress, S 655 and HR 1983.

10. In view of the strong arguments against unitary taxation and the recent extension of its application in New York State, our Governments urge you to support this legislation in so far as it relates to the unitary tax issues raised above, with a view to early enactment.

AMBASSADE DE BELGIQUE

The Embassy of Belgium presents its compliments to the Department of State and, on behalf of the Ten E.C. Governments, of which the Government of Belgium has now the presidency, it has the honor to forward the attached Note on the problems of the unitary method of taxation.

The Embassy of Belgium welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C. June 29, 1982

[SEAL]

Attached: Note

The Department of State
Washington, D.C.

UNITARY TAXATION

1. Our Governments refer to their Note on unitary taxation forwarded on their behalf to the Department of State on 30 October 1981 by Her Britannic Majesty's Embassy.

2. Our Governments remain firmly convinced that the unitary basis of taxation with combined reporting, particularly as applied in the international field, is entirely unsatisfactory.

3. As was pointed out in that Note, unless the same basic rules for calculating taxable profits are followed generally by the main trading nations it will be impossible to achieve the essential objective of providing a consistent and coherent international tax framework for trade and investment.

4. Our Governments wish to draw the attention of the State Department to the case of Container Corporation of America vs Franchise Tax Board which we understand is to be heard in the Supreme Court of the United States during the October Term 1982, and urge as a matter of high priority that the Government of the United States should participate in this case as amicus curiae.

EMBASSY OF GREECE
Washington, D.C.

The Embassy of Greece presents its compliments to the Department of State and, on behalf of the Ten European Community Governments, of which the Government of Greece has now the presidency, it has the honor to forward the attached Note on the problems of the unitary method of taxation.

The Embassy of Greece welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., August 1, 1983

Attached: Note

The Department of State
Washington, D.C.

[SEAL]

UNITARY TAXATION

I. Our governments refer to their note on unitary taxation forwarded to the Department of State by the Embassy of Belgium on 29 June 1982.

II. That note drew the attention of the State Department to the case before the Supreme Court of the Container Corporation of America versus the California Franchise Tax Board and urged as a matter of high priority that the government of the United States should participate in that case as amicus curiae. The decision was handed down by the court on 27 June, 1983, and the court found that application of the unitary business principle by the State of California to Container Corporation and its foreign subsidiaries was proper. A majority of justices held that that fact that no brief had been submitted on behalf of the United States government meant there was no indication that the position taken by the government in the

case of the Chicago Bridge and Iron Company still represented its views or that the brief in the Chicago Bridge case applied to the Container case.

III. Although the Supreme Court decision did not apply to US companies with foreign parents, our governments were disappointed by the Container decision. They remain convinced that the unitary basis of taxation with combined reporting, particularly as applied in the international field, is unsatisfactory. Our governments therefore urge that the United States government should give strong support to legislation to ensure that States do not use that method of taxation at least for the subsidiaries of foreign corporations. There are currently two relevant bills in Congress, HR 2918 and S.1225.

IV. It is particularly important that federal legislation should be adopted at an early stage since there are already signs that, following the decision in the Container case, other American States not at present using this method are contemplating adopting worldwide combined reporting.

EMBASSY OF GREECE
Washington, D.C.

The Embassy of Greece presents its compliments to the Department of State and, on behalf of the Ten European Community Governments, of which the Government of Greece has now the presidency, it has the honor to forward the attached Note on the problems of the unitary method of taxation.

The Embassy of Greece welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., September 23, 1983

Attached: Note

The Department of State
Washington, D.C.

[SEAL]

Our Governments refer to their note on unitary taxation forwarded to the Department of State by the Embassy of Greece on August 1st. Since that note was delivered Container Corporation of America has submitted a petition to the Supreme Court of the United States to have its case, originally decided on June 27th, 1983, reheard by the Court.

In its petition, the Container Corporation points out, that a rehearing is necessary to determine the correctness of the Court's assumption—made on the basis that the Administration did not follow up its amicus curiae brief in the case of Chicago Bridge and iron with a further amicus brief in the case of Container Corporation—that the foreign policy of the United States is not seriously threatened by California's decision to apply the unitary business concept. We urge the U.S. Government to submit an amicus brief to the Court now in order to make it clear that this assumption is incorrect, and to

open the way for the Court to agree to a rehearing. This would be an important first step in eliminating world-wide combined reporting as used by several states as a means of taxing multinational corporations, which we hope the Administration will oppose by all the avenues that are open to it.

ANNEX B

COMPARISON BETWEEN PERTINENT PROVISIONS OF NETHERLANDS FCN TREATY AND FCN TREATIES WITH OTHER MEMBER STATES OF THE EUROPEAN COMMUNITIES

	Netherlands FCN Treaty Articles					
	I(1)	VI(3)	VII(1)	XI(1)	XI(3)	XI(4)
Belgium	1	4(2)	6	9(1)	9(3)	9(4)
Denmark	I	VI(4)	VII, VIII	XI(1)	XI(3)	XI(4)
France	I	IV(1)	V(1)	IX(1)	IX(2)	IX(4)
W. Germany	I(1)	V(3)	VII(1)	XI(1)	XI(3)	XI(4)
Greece	I	VIII	XII, XIII	XVI(1)	XVI(2)	XVI(3)
Ireland	V	V	VI	IX(1)(b)	IX(1)(a)	IX(2)
Italy	—	Supp. art. I	II, III	IX(1)(b)	IX(1)(a)	IX(2)
Luxembourg	I	IV(2)	VI(1)	X(1)	X(3)	X(4)

Sources:

1. Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, 14 U.S.T. 1284, T.I.A.S. No. 5432.

2. Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, 12 U.S.T. 908, T.I.A.S. No. 4797.

3. Convention of Establishment, Nov. 25, 1959, United States-France, 11 U.S.T. 2398, T.I.A.S. No. 4625.

4. Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593.

5. Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, United States-Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057.

6. Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, 1 U.S.T. 785, T.I.A.S. No. 2155.

7. Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, 63 Stat. 2255, T.I.A.S. No. 1965; Supplemental Agreement, Sept. 26, 1951, 12 U.S.T. 131, T.I.A.S. No. 4685.

8. Treaty of Friendship, Establishment and Navigation, Feb. 23, 1962, United States-Luxembourg, 14 U.S.T. 251, T.I.A.S. No. 5306.

Office-Supreme Court, U.S.
FILED
OCT 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-586

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SHELL PETROLEUM N.V.,
Petitioner,
v.

MICHAEL FRANCHETTI, KENNETH CORY,
WILLIAM M. BENNETT, Individually and
as Members of, and GERALD H. GOLDBERG,
Individually and as Executive Officer of,
THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS AS AMICUS CURIAE

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October 17, 1983

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-586

SHELL PETROLEUM N.V.,
Petitioner,

v.

MICHAEL FRANCHETTI, KENNETH CORY, WILLIAM M. BENNETT, Individually and as Members of, and GERALD H. GOLDBERG, Individually and as Executive Officer of, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

This case presents important questions of interpretation of the Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States (the "Netherlands FCN Treaty").[1] That Treaty confers important rights, with respect to taxation and other matters, on Netherlands companies engaged (through subsidiaries or otherwise) in trade or other

[1] Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942.

gainful pursuit in the United States, and confers reciprocal rights on U.S. companies similarly engaged in the Netherlands. Netherlands businesses protected by the Treaty, including petitioner Shell Petroleum N.V. ("SPNV"), generate 21 percent of all foreign direct investment in the United States—more than the businesses of any other country except the United Kingdom.[2]

The decision below threatens to vitiate the rights conferred by the Treaty on Netherlands companies by denying the companies the ability to obtain judicial enforcement of those rights, or of their rights under the U.S. Constitution. The Netherlands Government, as one of the two parties to the Treaty, therefore has a significant interest in the disposition of this petition for certiorari.

At the suggestion of this Court, the Department of State has encouraged foreign governments to assert interests of this nature by filing amicus briefs in pending judicial proceedings.[3] The Netherlands Government filed amicus briefs in this case in both of the courts below.

SUMMARY OF ARGUMENT

SPNV's complaint presents, on the merits, an issue of great international importance. That issue is whether a state of the United States may, consistently with applicable treaties, the U.S. Constitution, and international law, apply a "unitary" taxation method to the combined worldwide incomes of a foreign parent company, its U.S. subsidiaries, and all of its foreign subsidiaries. Attempts

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[2] The United Kingdom accounts for 23 percent of foreign direct investment in the United States. *See* Bureau of Economic Analysis, United States Department of Commerce, *Foreign Direct Investment in the United States*, 63 Survey of Current Business 31, 36 (Aug. 1983, No. 8). Until 1982, the Netherlands was the largest source of foreign direct investment in the United States. *See* 62 *id.* at 30-41 (Aug. 1982, No. 8); 61 *id.* at 40-51 (Aug. 1981, No. 8).

[3] *See* Letter from Michael Rodak, Jr. to Wade H. McCree, Jr. (Apr. 17, 1978); Letter from Wade H. McCree, Jr. to Michael Rodak, Jr. (Sept. 6, 1978), in *Zenith Radio Corp. v. United States*, No. 77-539.

by California and a growing number of other states to impose such "upstream" unitary taxation have provoked a storm of diplomatic protests by foreign governments to the Government of the United States.

Last term, the Court expressly reserved the constitutionality of this controversial practice when it decided *Container Corporation of America v. Franchise Tax Board*, which involved only the constitutionality of "downstream" unitary taxation of a U.S. parent company and its foreign subsidiaries.[4] California's attempt to reach "upstream" to the worldwide income of a foreign parent company and its foreign subsidiaries not only raises different, and more difficult, constitutional questions than the "downstream" practice sustained in *Container*; it also raises serious questions under the network of treaties that define the United States' commercial relationships with its principal trading partners—treaties that the U.S. Constitution makes the supreme law of the United States. Because *Container* involved a U.S. parent company, it did not raise those treaty questions.

The courts below ruled that SPNV, which they characterized as a mere shareholder of its U.S. subsidiaries, may not challenge California's application of the unitary tax method to the incomes of SPNV and its over 900 subsidiaries and affiliates operating in over 100 countries throughout the world. Despite the fact that California bases its method on the asserted "unity" of the businesses of the Netherlands parent and its worldwide subsidiaries, the courts below ignored this claimed "unity" when they denied standing to SPNV.

The Netherlands Government submits that, in denying standing to SPNV, the lower courts misinterpreted three provisions of the Netherlands FCN Treaty: the tax provision (article XI), and two provisions (articles I(1) and VI(3)) that impose limits on any type of regulation

[4] 103 S. Ct. 2933, 2952 n.26, 2956 n.32 (1983).

that federal or state authorities may impose on the property, enterprises, or other interests of Netherlands companies. Almost all of the 22 other FCN treaties executed by the United States since World War II contain similar provisions. Thus, the novel interpretation adopted below will prevent companies of many trading partners from enforcing their treaty rights in American courts. And if tribunals in other countries were to follow the lower courts' interpretation, American companies would be equally unable to invoke the treaties to protect their own foreign investments. Some of the most important reciprocal rights established by these treaties, carefully negotiated over decades, would be rendered unenforceable.

The courts below also ruled that the suit is unripe because California's tax authorities have issued only proposed, not final, assessments. But California has maintained constantly for eight years that it may apply the unitary method "upstream" to reach SPNV's income and those of its foreign affiliates; and it has required SPNV's U.S. subsidiaries to produce information about worldwide activities of the foreign affiliates that only SPNV, if anyone, can provide. It is the validity of that application of the unitary method which SPNV seeks to challenge, as a matter of law. Nonetheless, the lower courts refused to adjudicate SPNV's treaty rights because of the pendency of state proceedings in which SPNV may not participate —and in which, according to California, the participating U.S. subsidiaries cannot invoke any rights under the Treaty. If this case is unripe, it is difficult to imagine when or how the treaty issues can be raised in any U.S. forum.

"Upstream" unitary taxation has evoked continuing diplomatic protests from the governments of the Netherlands and other countries. It has already created the prospect of foreign retaliation that would further disturb U.S. foreign relations. The probability that additional states will be encouraged by *Container* to adopt this prac-

tice—as Florida has already done—makes timely resolution of the standing of foreign companies to contest the tax especially important.

ARGUMENT

In recent cases involving unitary taxation, this Court has considered the increasingly imaginative efforts of some states of the United States to widen the net by which income earned by affiliated companies in foreign countries can be caught and included in the tax base to which a state apportionment formula is applied.[5] Last Term, in *Container Corporation of America v. Franchise Tax Board*,[6] the Court held that the Constitution does not forbid a state to apply unitary taxation "downstream" to reach the income earned abroad by the foreign subsidiaries of a U.S. parent company.

The Court in *Container* expressly reserved decision on the constitutional validity of applying the unitary method to the very different situation where the parent company is foreign.[7] To apply the unitary approach "upstream" means that the tax is based on income that is not owned either directly or indirectly by the only companies subject to the taxing state's jurisdiction—the U.S. subsidiaries. Three dissenting Justices stated that such an application of the California unitary method would violate the Constitution. They noted that "upstream" application of the unitary method has elicited repeated objections from major trading partners of the United States.[8]

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[5] *See Container Corporation of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983); *F.W. Woolworth Co. v. Taxation & Revenue Department*, 102 S. Ct. 3128 (1982); *ASARCO Inc. v. Idaho State Tax Commission*, 102 S. Ct. 3103 (1982).

[6] 103 S. Ct. 2933 (1983).

[7] 103 S. Ct. at 2952 n.26, 2956 n.32.

[8] *Id.* at 2960 n.4 (Powell, J., dissenting).

Those objections have been renewed in the wake of the *Container* decision.[9]

The Court in *Container* recognized that the "accepted international practice" is to apply the "arm's length" method of taxation, and that California's unitary approach is a "serious divergence" from that standard.[10] The Netherlands Government, a party to the Netherlands FCN Treaty, believes that the Treaty (which is binding on the states of the United States) incorporates the internationally accepted arm's length principle of taxation with respect to domestic subsidiaries of foreign companies.[11] California's use of a contrary method is inconsistent with the Treaty.

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[9] The Court decided *Container* on June 27, 1983. On August 1 the 10 governments of the European Community delivered a diplomatic note to the U.S. Government renewing their objection to the "upstream" application of the unitary tax. Similar objections were voiced in correspondence from the Netherlands Government on August 17, the Japanese Government on August 11, the Canadian Government on August 23, and the British Government on September 6. On September 15 the Netherlands Government delivered a diplomatic note urging the U.S. Government to support SPNV's petition for certiorari in this case. These communications are reproduced in Annex A to this Brief (except for the correspondence from the British Government, the text of which has not been made public). *See Tax Policy: Reagan Delays Decision on Cabinet Council Options to Solve Unitary Tax Dilemma*, Taxation & Accounting Rep. (BNA) No. 178, at G-3 (Sept. 13, 1983).

[10] 103 S. Ct. at 2951-52.

[11] U.S. commercial treaties in general, and the FCN treaties in particular, bind American states and localities as well as the federal government. *See, e.g., Nielsen v. Johnson*, 279 U.S. 47 (1929); *Deutsche Lufthansa AG v. City of New York*, 85 Misc. 2d 719, 379 N.Y.S.2d 635 (Sup. Ct. 1976) (West German FCN Treaty). *See generally Missouri v. Holland*, 252 U.S. 416 (1920). In this respect, the commercial treaties differ from U.S. double-taxation treaties, which by their terms apply in most respects only to federal income taxation. *See, e.g.*, Convention with Respect to Taxes on Income and Certain Other Taxes, April 29, 1948, United States-Netherlands, 62 Stat. 1757, T.I.A.S. No. 1855.

The U.S. double-taxation treaties do not supersede or override the tax provisions of the FCN treaties. Indeed, the Netherlands

SPNV's complaint below squarely presented the "upstream" issue. SPNV contends that California violated its rights under articles I(1), VI(3), and XI of the Netherlands FCN Treaty by basing the taxes imposed on SPNV's two U.S. subsidiaries (Shell Oil Company and Scallop Nuclear Inc.) on the combined worldwide incomes of SPNV and its over 900 affiliates. SPNV also claims that the burdensome information demands made by California violate the same treaty provisions. The provisions SPNV invokes all expressly protect "companies of" the Netherlands, which SPNV plainly is. SPNV also contends that California's practice violates the Constitution and customary international law.

The district court did not consider the merits of SPNV's contentions. Rather, it ruled that SPNV lacks standing to obtain an adjudication of the validity of California's practice under the Treaty (or the Constitution or international law). It ruled also that the action was unripe because California's tax authorities had not issued final assessments against the U.S. subsidiaries. The court of appeals affirmed both aspects of the district court's decision.

Unless reversed, the decisions below may render important treaty provisions unenforceable. Twenty-one of the United States' 23 modern FCN treaties, including the Netherlands FCN Treaty, purport to grant rights to com-

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FCN Treaty, like some others, was entered into *after* the counterpart double-taxation treaty. Therefore, it is clear that the provisions of the FCN Treaty should be given independent effect where they go beyond those of the double-taxation treaty, as they do in applying fully to the states. *See* Convention with Respect to Taxes on Income and Certain Other Taxes, April 29, 1948, United States-Netherlands, 62 Stat. 1757, T.I.A.S. No. 1855; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942.

panies of the foreign treaty party in the United States and to U.S. companies in the opposite situation. If those companies lack standing to invoke the very provisions that expressly protect them, the provisions may be meaningless. The lower courts' refusal to adjudicate SPNV's rights should be reviewed promptly because of the importance of the enforceability of these treaties, as well as the foreign relations impact of the tax practice that underlies SPNV's complaint.

I. By Denying the Right of a Company of the Netherlands to Invoke the Netherlands FCN Treaty, the Decision Below Eviscerates that Treaty and 20 Similar Treaties with Other Nations

This Court has never been asked to decide whether a foreign company has standing under an FCN Treaty to challenge a state's conduct as inconsistent with the treaty.[12] The express language of the treaties appears to provide a clear affirmative answer to that question. By arriving at a negative answer, the lower courts have created an important issue warranting review in this Court.

Each article of the Treaty invoked by SPNV expressly protects "companies of" the Netherlands.[13] There is no dispute that SPNV is such a company. And the lower courts recognized that SPNV has alleged injury in fact sufficient to satisfy the constitutional test for standing.[14]

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[12] In *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), the Court held that a U.S. subsidiary of a Japanese company was not a "company of" Japan for purposes of the Japanese FCN Treaty. This case, unlike *Sumitomo*, concerns the rights of the foreign company itself, not of its U.S. subsidiaries.

[13] The pertinent provisions of the Treaty are set forth in Annex B to this Brief.

[14] *See* Pet. App. at 3a, 16a n.6.

Nonetheless, they denied SPNV standing as a prudential matter, on the ground that a domestic company that owned a comparable interest in Shell Oil or Scallop Nuclear would not have standing in similar circumstances.

That ruling has three crippling effects on the Treaty. First, it reduces the Treaty, and the 20 similar post-war FCN treaties, to ones granting only national treatment to companies of the treaty parties. The provisions relied on by SPNV plainly provide more than national treatment. They establish absolute standards of treatment of Netherlands and U.S. companies by the other treaty party, which are not defined by reference to the constitutional or statutory rights of domestic firms. Article XI(4) forbids taxation of income not "reasonably allocable" to the taxing jurisdiction; and articles I(1) and VI(3) prescribe "fair" and "reasonable" treatment. In addition, article XI(3) entitles Netherlands companies to most-favored-nation treatment—that is, the most favorable treatment the United States or any of its states grants to the companies of any third nation, even if more favorable than that granted to U.S. companies. SPNV relied on article XI(3) to invoke the substantively similar, but more precisely worded, anti-unitary tax provisions of the French FCN Treaty.[15] To dismiss SPNV's complaint because (in the lower courts' view) a U.S. company could not sue in similar circumstances is to deny any effect to these provisions. Equally vitiated are the reciprocal provisions that, for example, entitle U.S. firms to just compensation for the expropriation of property, whether or not such compensation is provided to companies of the expropriating treaty party under its own laws.[16]

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[15] Convention of Establishment, Nov. 29, 1959, United States-France, art. IX(4), 11 U.S.T. 2398, 2409-10, T.I.A.S. No. 4625.

[16] Netherlands FCN Treaty art. VI(4), 8 U.S.T. at 2051.

Second, the ruling below, in conjunction with this Court's *Sumitomo* decision,[17] may effectively prevent any affected party from litigating the validity of California's practice under the Treaty. Respondents and the lower courts interpret *Sumitomo* to preclude the U.S. subsidiaries from presenting claims based on the Treaty, because they are not "companies of" the Netherlands. Yet SPNV, because it is not the nominal taxpayer in California, is barred from participating in the state administrative or judicial proceedings concerning the taxes on its subsidiaries.[18] If SPNV may not assert its treaty rights by a suit in federal court, the result is a Catch-22 situation in which no entity may invoke the protections the Treaty purports to confer on Netherlands investments and enterprises in the United States.[19] A similar interpretation of the Treaty by Netherlands tribunals would leave American companies and their subsidiaries in the Netherlands equally unable to invoke the Treaty's protections.

Third, the lower courts' interpretation imports into the Treaty an unwarranted discrimination between the different forms of gainful pursuit in which a Netherlands company may engage within the United States. The district court acknowledged that, under the ruling below, a Netherlands company would have standing to challenge U.S. treatment of its interests only if it transacted business in the United States through an unincorporated branch office, rather than through a subsidiary.[20] But

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[17] *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982).

[18] *See Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107 (9th Cir.), *cert. denied*, 455 U.S. 943 (1982).

[19] Even the Government of the Netherlands could not sue the State of California for violating the Treaty without California's consent. *See Monaco v. Mississippi*, 292 U.S. 313 (1934).

[20] Pet. App. at 18a-19a.

article VII(1) of the Treaty makes plain that both forms of investment are permissible and entitled to the protections of the Treaty.[21] Local subsidiaries are by far the dominant form of foreign direct investment by Netherlands companies as well as U.S. companies.[22] The Treaty and the 20 similar FCN treaties can scarcely achieve their reciprocal objectives if they give no protection to that form of investment.

By giving controlling significance to the separate identities of SPNV and its U.S. subsidiaries in this context, the lower courts have produced a logically untenable result. The very justification for California's "upstream" unitary approach is its assertion that the worldwide Royal Dutch/Shell companies, including SPNV, are a unitary enterprise, justifying the negation of their separate identities. Yet both the Netherlands parent and its U.S. subsidiaries are denied standing to challenge that unitary approach under the Treaty because of their separateness from one another.

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[21] Article VII(1) provides in pertinent part:

"[C]ompanies of either Party shall be accorded national treatment with respect to *engaging in all types of* commercial, industrial, financial and other *activity for gain* (business activities) within the territories of the other Party, *whether directly or by agent or through the medium of any form of lawful juridical entity*. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) *either directly or indirectly* through one or more intermediaries, *to organize companies under the general company laws of such other Party* . . . ; (c) to control and manage enterprises which they have established or acquired." (Emphasis added.)

[22] *See* Bureau of Economic Analysis, United States Department of Commerce, *U.S. Direct Investment Abroad*, 62 Survey of Current Business 11 (Aug. 1982, No. 8); *Foreign Direct Investment in the United States*, *id.* at 30, 31.

The courts below seemed to think that, because California's measures are directed nominally at the U.S. subsidiaries, which they held have no treaty rights, SPNV is suffering no infringement of its own treaty rights. But to treat the legal incidence of the tax as a talisman denies SPNV, the "upstream" parent, the right to show that *its* income from sources elsewhere in the world is being subjected to double taxation—once in the countries of origin and again in California by virtue of the unitary approach. And it ignores the fact that the information demands, backed by a penalty for noncompliance, call for information that the U.S. subsidiaries do not possess and can produce only if SPNV is able to assemble it from non-U.S. sources and supply it to the U.S. subsidiaries. If SPNV asserts a treaty right not to supply the information, the $8 million in penalties levied against the subsidiaries will appear directly on the consolidated financial statements of the Royal Dutch/Shell companies as a decrease in their net worth.

This Court in *Container* recognized that, in the case of a foreign parent company with U.S. subsidiaries, these considerations of practical substance may prevail over legal forms:

> "[T]he fact that the legal incidence of a tax falls on a corporation whose formal corporate domicile is domestic might be less significant in the case of a domestic corporation that was owned by foreign interests." [23]

The rulings below are blind to these considerations.

Moreover, the impact of the ruling goes far beyond taxation. Although Article XI applies only to taxation, articles I(1) and VI(3) govern all types of government regulation. If SPNV cannot invoke those provisions, California and other states may be free to take any kind of

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[23] 103 S. Ct. at 2956 n.32.

discriminatory or confiscatory action against SPNV's subsidiaries, despite the express prohibition in article VI(3), for example, of "unreasonable or discriminatory measures that would impair the rights or interests within [U.S.] territories of nationals and companies of [the Netherlands,] whether in their capital, or in their enterprises and the property thereof . . . ." It is difficult to imagine what remains of these important reciprocal treaty protections when no injured person has standing to invoke them in the treaty party's national courts.[24]

The impact also goes beyond Netherlands companies. As this Court has noted, the Netherlands FCN Treaty is "one of a series of similar commercial agreements negotiated after World War II." [25] The United States is a party to 22 other such treaties, 20 of which contain provisions identical or substantially similar to the articles invoked here.[26] Each of those treaties is as vulnerable as the Netherlands treaty to the rationale of the ruling below. If the ruling below stands, there is a danger that the courts of the other treaty parties will reciprocate if an American company invokes their protection against a claimed treaty violation. The treaty fabric woven by the United States and its trading partners to provide mutual protection for investments is thus seriously weakened. This broad impact of the rulings below increases the appropriateness of review by this Court.

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[24] *Cf. Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 136 (1968) (granting certiorari "[b]ecause these rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States").

[25] *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. at 185 & n.13.

[26] Annex C to this Brief lists the comparable provisions of other post-war U.S. FCN treaties.

II. The Decision Below Prevents Prompt Resolution of the International Controversy over "Upstream" Unitary Taxation and Conflicts with this Court's Decision in *McCulloch v. Sociedad Nacional de Marineros de Honduras*

The claims in SPNV's complaint are ripe in every practical sense. It is undisputed that SPNV will suffer injury in fact, sufficient under Article III of the Constitution, from California's actions. The state tax proceedings are already eight years old, and the facts necessary and sufficient for adjudication of the complaint will not change: California has insisted since 1975 that it is entitled to apply its unitary tax method "upstream" to reach the incomes of SPNV and its worldwide affiliates; and SPNV asserts that the Treaty forbids such tax treatment. This purely legal issue—dispositive of the controversy—has been joined, and further state proceedings cannot aid in its resolution. To refuse to adjudicate SPNV's treaty rights because of the pendency of state proceedings in which SPNV cannot participate—and in which, according to California, *Sumitomo* bars the subsidiaries from invoking the Treaty—would impose hardship for no constructive purpose. The case is thus ripe under this Court's controlling decisions.[27]

Moreover, this Court has established that possible disruption of foreign relations weighs heavily in favor of ripeness. In *McCulloch v. Sociedad Nacional de Marineros de Honduras*,[28] the Court held that a federal district court has jurisdiction *before* completion of agency proceedings to determine whether the agency is exceeding its power, where the controversy over the agency's power "has aroused vigorous protests from foreign governments and

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[27] *See Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S. Ct. 1713 (1983).

[28] 372 U.S. 10 (1963).

created international problems for [the U.S.] Government." [29]

California's attempted "upstream" application of its unitary method has been the subject of repeated diplomatic protests from other governments since 1979.[30] The Netherlands Government and the Japanese Government have also voiced their concern by filing briefs as amici curiae in the proceedings below. The Netherlands Government has repeatedly stressed its concern over the unitary taxation method during its efforts to negotiate a new convention with the United States on double taxation at the national level. And retaliatory legislation was recently proposed in the British Parliament.[31] The controversy may be exacerbated as additional states, encouraged by the *Container* decision, move to adopt the unitary approach without distinguishing between "downstream" and "upstream," [32] and as additional foreign countries

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[29] *Id.* at 16-17.

[30] The most recent communications are listed in note 9 above and reproduced in Annex A. Earlier protests against unitary taxation were made to the U.S. Government by the Netherlands Government (September 18, 1979, and May 22, 1981), all governments of the European Community acting together (March 19, 1980, October 30, 1981, and June 29, 1982), and the British Government (December 17, 1981). *See* Pet. App. at 54a-89a.

[31] Notice of Amendment to 1983 Finance Bill to Amend the Income and Corporation Taxes Act 1970, § 497, tabled in the House of Commons July 14, 1983 (denying tax credit to U.S. corporations established, or with affiliates established, in a state employing unitary taxation).

[32] Before *Container*, ten states applied unitary taxation on an "upstream" worldwide basis—Alaska, California, Colorado, Idaho, Massachusetts, Montana, New Hampshire, North Dakota, Oregon, and Utah. Less than three weeks after *Container*, Florida enacted a similar system. Florida Senate Bill 3C (adopted July 12, 1983). One Florida legislator was quoted as saying that "It was like finding money on the street, and we grabbed it." *Florida's Legislature Is Latest to Approve Unitary Tax Law*, Wall St. J., July 19, 1983, at 29, col. 1.

consider retaliatory action.[33] The importance of the controversy to both state and foreign governments is a compelling reason for this Court to resolve promptly the questions presented by SPNV's petition.[34]

The U.S. Government has recognized the significance of the controversy. In a brief it submitted as amicus curiae in *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.*, that government expressed its concern that worldwide combination and apportionment undermines its ability to "speak with one voice when regulating commercial relations with foreign governments" and indicated that in the "upstream" situation the method may violate some FCN treaties.[35]

These circumstances present "compelling justification for prompt judicial resolution of the controversy over the Board's power," as this Court said in *McCulloch*.[36] The court of appeals did not even discuss *McCulloch*, although the case was called to its attention. Its ruling should be reviewed to correct an inconsistency with a controlling decision of this Court.

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[33] The British Prime Minister recently was quoted as stating that foreign retaliation "could fundamentally undermine investment in other countries, and the people who would suffer most damage would be those who have the most multinational companies." *Reagan's Delay on Unitary Tax Is Victory for States but May Spark Trade Problems*, Wall St. J., Sept. 26, 1983, at 8, col. 2.

[34] *Cf. McGee v. International Life Insurance Co.*, 355 U.S. 220, 221 (1957) (granting certiorari because case "raised important questions, not only to California but to other states which have similar laws").

[35] Memorandum for the United States as Amicus Curiae at 3, 16-17, *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.*, No. 81-349 (U.S. Jan. 14, 1982) (*quoting Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976)). Nine days after the *Container* decision, this Court dismissed the appeal in *Chicago Bridge* for lack of a substantial federal question. 51 U.S.L.W. 3937 (U.S. July 6, 1983).

[36] 372 U.S. at 17.

CONCLUSION

For these reasons, the Netherlands Government respectfully submits that this Court should grant the writ of certiorari. The Netherlands Government also respectfully concurs in SPNV's suggestions:

1) That the Court may wish to consider requesting the Solicitor General to express the views of the United States on whether the petition should be granted; and

2) That, if the petition is granted, the Court may wish to consider requesting the parties to brief and argue the questions whether the application of the California unitary tax to the U.S. subsidiaries of SPNV violates the Netherlands FCN Treaty and the Constitution.[37]

Respectfully submitted,

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WILLIAM T. LAKE
ROBERT M. POZIN
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Counsel for the Government of the Kingdom of the Netherlands as Amicus Curiae

October 17, 1983

* Counsel of Record

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[37] *See Capital Cities Cable, Inc. v. Crisp*, No. 82-1795, 52 U.S.L.W. 3262 (U.S. Oct. 3, 1983); *Buckley v. Valeo*, 424 U.S. 1, 9-10, 113-18 (1976); *Doe v. Bolton*, 410 U.S. 179, 187-88 (1973); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 44-45 (1961).

ANNEXES

ANNEX A

DIPLOMATIC CORRESPONDENCE CONCERNING UNITARY TAX

EMBASSY OF GREECE
Washington, D.C.

The Embassy of Greece presents its compliments to the Department of State and, on behalf of the Ten European Community Governments, of which the Government of Greece has now the presidency, it has the honor to forward the attached Note on the problems of the unitary method of taxation.

The Embassy of Greece welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., August 1, 1983

Attached: Note

The Department of State
Washington, D.C.

[SEAL]

UNITARY TAXATION

I. Our governments refer to their note on unitary taxation forwarded to the Department of State by the Embassy of Belgium on 29 June 1982.

II. That note drew the attention of the State Department to the case before the Supreme Court of the Container Corporation of America versus the California Franchise Tax Board and urged as a matter of high priority that the government of the United States should participate in that case as amicus curiae. The decision was handed down by the court on 27 June, 1983, and the court found that application of the unitary business principle by the State of California to Container Corporation and its foreign subsidiaries was proper. A majority of justices held that that fact that no brief had been submitted on behalf of the United States government meant there was no indication that the position taken by the government in the case of the Chicago Bridge and Iron Company still represented its views or that the brief in the Chicago Bridge case applied to the Container case.

III. Although the Supreme Court decision did not apply to US companies with foreign parents, our governments were disappointed by the Container decision. They remain convinced that the unitary basis of taxation with combined reporting, particularly as applied in the international field, is unsatisfactory. Our governments therefore urge that the United States government should give strong support to legislation to ensure that States do not use that method of taxation at least for the subsidiaries of foreign corporations. There are currently two relevant bills in Congress, HR 2918 and S. 1225.

IV. It is particularly important that federal legislation should be adopted at an early stage since there are already signs that, following the decision in the Container case, other American States not at present using this method are contemplating worldwide combined reporting.

[SEAL]

Minister
Van
Financien

Nr. 083-2055

The Honorable Donald T. Regan
Secretary to the Treasury
Washington, D.C. 20220
United States of America

Dear Mr. Regan,

I am writing you on the subject of unitary taxation. Recently the United States Supreme Court delivered its decision in the case of Container Corporation of America v. The California Franchise Tax Board, upholding the right of a state to use worldwide formula apportionment to internationally operating companies.

The decision of the Supreme Court was received with dismay in my country. The method of unitary taxation inevitably leads to double taxation and entails an unduly heavy administrative burden especially for foreign enterprises holding U.S. companies. It has been mentioned to me that a severe budgetary loss for the states concerned would arise if worldwide apportionment were to be abolished and arm's length taxation restored. It should be borne in mind however that this implicitly means that a major part of that amount represents double taxation. Unitary taxation neglects differences in economic circumstances and adds together the results of different activities which almost certainly will have different degrees of profitability. Furthermore this method apportions part of the worldwide profit of an enterprise to a state even if the activities in that state have only produced losses. A striking example of this situation is at hand in the case of Shell Petroleum N.V. v. Mary Ann Graves (The California Franchise Tax Board) where a profit of about $40 million is apportioned to a U.S. sub-

sidiary engaged in non-oil related business, whereas that subsidiary has accumulated a loss of about $390 million over the taxable years concerned.

I would like to draw your attention to another consideration. The matter of unitary taxation has gained much attention among tax authorities throughout the world.

I fear that it is very tempting especially for less developed and other countries in urgent need of revenue to follow the Californian example and adopt this method which only requires the application of a simple formula to worldwide figures of multinational enterprises.

For the Netherlands Government the issue of unitary taxation has been of great concern for a considerable period of time as you may be aware. During the negotiations on the revision of the double taxation convention between our countries it has repeatedly been stressed that it is an anomaly to discuss the matter of avoidance of double taxation when—as a result of the unitary method—double taxation remains an inevitable consequence of operating a business within the territory of the partner to the convention.

Finally, Mr. Secretary, the Netherlands has for a long time had the impression that the Federal Government of the United States shares its concerns about the effects of unitary taxation. The filing of an amicus curiae brief by the U.S. Government in the case of Chicago Bridge and Iron v. Caterpillar was viewed in that light. However, no brief of amicus curiae was filed in the Container case. Now that the U.S. Government, as I understand, is considering its position towards the use of unitary taxation by states, I would urgently request you to take, or to support, any initiative which may put an end to this impediment to international trade.

Yours sincerely,

/s/ H. O. Ruding
H. O. RUDING

Embassy of Japan
Washington

August 11, 1983

Aide-Memoire

Re: The Unitary Tax System

The Government of Japan wishes to present to the U.S. Government agencies concerned the following views with regard to the Unitary Tax System.

The Unitary Tax System, which has been introduced in California and many other states of the U.S., has put a serious burden and constraint on the management and business activities of Japanese-affiliated companies operating in the U.S. We regard the Unitary Tax System as having the following problems:

—It has been causing international double taxation.

—It requires financial and other documents from the companies concerned, which include not only those of the parent company, but of other affiliated companies all over the world, and thus has imposed a tremendous burden on them.

—It has a discouraging effect on Japanese investment in the U.S., and hampers the sincere efforts by the U.S. and Japanese Governments to actively promote Japan-U.S. investment.

Based on this recognition, the Japanese Government has taken every opportunity to raise this question in such fora as the Japan-U.S. sub-cabinet level meeting and Japan-U.S. Trade Subcommittee, and requested the U.S. Government to take appropriate measures as soon as possible to abolish the Unitary Tax System.

On June 27th, the U.S. Supreme Court decided in the Container Corp. of America *vs* Franchise Tax Board Case, that the Unitary Tax System based upon the world-

wide profits of the company concerned, including those of the overseas affiliated companies, is constitutional. Although the Court decision was not on a case in which the head office is located abroad, we are concerned that the decision would encourage a number of states to newly introduce the Unitary Tax System or discourage the states which already have the System from abolishing it. We wish to reiterate that Unitary Taxation can be a barrier to the expansion and development of Japan-U.S. economic relations, including the promotion of our direct investment.

The Government of Japan, attaching great importance to the U.S. Supreme Court decision of June 27th, again expressed concern over this matter in the Japan-U.S. Trade Subcommittee meeting held this July at Wye Plantation, Maryland. We were encouraged to hear the U.S. Government explain that it is ready to present an amicus curiae brief in cases where diplomatic implication is involved. The Government of Japan strongly wishes that the U.S. Government will support the motion for rehearing, present the amicus curiae brief in connection with the rehearing of this case, and also take the same appropriate measures in connection with other individual cases. The Government of Japan further requests that the U.S. Government take concrete measures as soon as possible, including possible legislative actions, which will lead to the abolition of the Unitary Tax System.

Canadian Embassy [SEAL] Ambassade du Canada

1746 Massachusetts Avenue N.W.
Washington, D.C. 20036-1985

23 August 1983

The Honourable James A. Baker III
Chief of Staff and Assistant to the President
The White House
Washington, D.C. 20500

Dear Mr. Baker,

I am writing to you to flag the Canadian Government's concern regarding the unitary tax issue.

In the recent case of Container Corporation vs. the California Franchise Tax Board, the United States Supreme Court upheld the ability of a state government to levy taxes based on the worldwide earnings of multinational corporations. This method of taxation is inappropriate in the view of the Canadian Government because it places business corporations in the position of potentially having to pay tax in one jurisdiction for profits earned (and taxed) elsewhere. In addition to being contrary to good business practice, it constitutes an unnecessary and unfortunate intervention into taxing areas which should belong to the jurisdiction in which a corporation is actually doing business.

The Canadian Government view, which is expressed in the attached copy of a letter to Secretary Regan from Marc Lalonde (the Canadian Finance Minister) is that the United States should take appropriate steps to have state governments drop the unitary method of taxation before it grows to become a major stumbling block to international business and a serious foreign relations problem.

We have, of course, made our views known to several of the members of the Cabinet Council on Economic Affairs interagency working group which is developing an Administration position on this matter. However, I wanted to reinforce the seriousness which we attach to this issue by also drawing it to your attention.

Yours sincerely,

Allan Gotlieb
Ambassador

The Honourable Donald T. Regan
Secretary to the Treasury
Washington, D.C.
U.S.A. 20220

Dear Mr. Secretary:

I have recently had drawn to my attention the decision in the case of Container Corporation of America vs the California Franchise Tax Board in which the United States Supreme Court upheld the right of a state to use the unitary method of taxing corporate income.

The unitary method of taxation is a cause of considerable concern to a number of Canadian-based multinational corporations. Their concern arises out of three main considerations. First, the unitary method, by applying an arbitrary allocation formula to the consolidated world earnings of a corporate group, departs from the generally accepted international norm for determining the geographic source of income for tax purposes and gives rise to a serious potential for double taxation. Second, the costs of compliance arising out of the need to prepare consolidated returns that conform to the state tax accounting requirements are particularly onerous for Canadian and other foreign-based companies. Third, there is a concern that the sanction of the unitary method will result in its adoption by an increasing number of states and, possibly, by certain foreign countries as a means of increasing their tax revenues.

I understand that you have indicated recently that you were giving consideration to possible legislative initiatives as a result of the Supreme Court decision. I recognize that the issues involved are both complex and sensitive, but the application of the unitary method of taxation to the foreign source income of non-U.S. companies poses difficult problems for a large segment of the international business community. My purpose in writing is

to emphasize the seriousness of those problems and to encourage you to give urgent consideration to the ways in which they might be resolved.

With all good wishes and kind regards.

Sincerely,

Marc Lalonde

[SEAL]

EA-9639 Encl.

The Ambassador of the Netherlands presents his compliments to the Honorable the Secretary of State and has the honor to request Mr. Shultz's kind attention to the following:

In previous correspondence the Netherlands Government has presented to the Secretary of State its concerns about the "unitary" method of taxation that is being applied by the State of California to Shell Oil Company and Scallop Nuclear Inc., which are U.S. subsidiaries of Shell Petroleum N.V. ("SPNV"), a company of the Netherlands. In particular, the Netherlands Government objected to the State of California's applying its apportionment formula to the combined incomes of SPNV and its more than 900 subsidiaries and affiliates worldwide. The Netherlands Government expressed its view that this unitary tax approach, and the demands for information asserted in connection with it, are in conflict with the provisions of the Treaty of Friendship, Commerce and Navigation between the Netherlands and the United States of 1956 ("the Treaty"), and with general principles of international law.

In his note forwarded to the Netherlands Embassy on April 24, 1980, the Secretary of State advised that the Department of State would follow the case and would be pleased to consult with the Embassy at any opportune moment in the event that additional questions arose.

The Netherlands Government now wishes to bring to the attention of the Secretary of State important additional developments that seriously undermine the enforceability of the Treaty, in the tax area and other areas as well. On November 4, 1981, SPNV filed suit in the U.S. District Court for the Northern District of Cali-

fornia challenging California's unitary approach on the grounds, among others, that it conflicts with the Treaty and with general principles of international law, and also violates the Constitution of the United States. The Netherlands Government submitted a memorandum as *amicus curiae* stating its view that unitary taxation of a Netherlands-based multinational enterprise is in conflict with the Treaty and international law.

The district court did not consider the merits of SPNV's complaint or of the views presented by the Netherlands Government. Instead, on August 4, 1982, the court dismissed the complaint on the ground that, notwithstanding the articles of the Treaty on which SPNV relied, as a shareholder of its U.S. subsidiaries SPNV had no standing to challenge California's practice, and also on the ground that SPNV lacked standing to raise its constitutional claims. The court further held that the suit was unripe because defendants had not finally determined the amounts of tax due. A copy of the court's opinion is annexed.

SPNV appealed to the U.S. Court of Appeals for the Ninth Circuit. The Netherlands Government filed a brief *amicus curiae* in that court stating its view that the district court's ruling was based on a misreading of the Treaty. On June 30, 1983, the court of appeals affirmed the district court's decision on both standing and ripeness grounds. A copy of the appellate opinion is annexed.

The Netherlands Government is informed that SPNV will file a petition for certiorari in the Supreme Court, seeking review of the court of appeals' decision. The Netherlands Government intends to submit a brief as *amicus curiae* urging that certiorari be granted in light of the international importance of the issues presented.

The Netherlands Government believes that the court of appeals' decision denying the standing of SPNV, a Netherlands parent company, to invoke the Treaty may

be even more damaging to the effectuation of the purposes of the Treaty than an adverse disposition on the merits would have been. The appellate court left undisturbed the district court's decision suggesting that a Netherlands company may invoke the substantive protections of the Treaty in an American court only if it engages in trade or gainful pursuit within the United States through an unincorporated branch establishment, and not if it does so through a U.S. subsidiary corporation. That ruling imports into the relevant provisions of the Treaty a limitation they do not contain. Unless reversed by the Supreme Court, the lower court decisions will frustrate the Treaty's objectives by discriminating for standing purposes against the form of investment—local incorporation—that is most frequently used by both Netherlands and U.S. parent companies, and which is specifically provided for in the Treaty.

In addition, the court of appeals' interpretation of the Supreme Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), unduly limits the applicability of the Treaty. In interpreting *Sumitomo* to mean that a Netherlands company can under no circumstances have greater rights than a U.S. corporation, irrespective of the provisions of the Treaty, the court of appeals' decision ignores the existence of separate treaty provisions granting most-favored-nation treatment and conferring independent substantive rights, with respect to taxation and other matters, on Netherlands companies engaged in trade or gainful pursuit in the United States.

Moreover, two of the treaty provisions under which SPNV was denied standing—Articles I(1) and VI(3)—are not limited to taxation but protect companies of one party with respect to any governmental conduct within the other. Therefore, the pernicious effects of the court's construction would not be limited to the area of taxation. If a similar interpretation of the Treaty were adopted by Netherlands tribunals, American companies that estab-

lished subsidiaries in the Netherlands, and the subsidiaries themselves, would lose the right to invoke the Treaty's protections against unreasonable or discriminatory treatment in taxation and many other areas. As a result, important provisions of the Treaty would be almost entirely vitiated.

In his note of April 24, 1980, the Secretary of State indicated his presumption that the legal issues relating to the permissibility of the State of California's unitary tax method would be decided by U.S. courts of competent jurisdiction. The court of appeals has rendered that presumption false by denying a Netherlands company the right even to present for adjudication the issue of the compatibility of California's practice with the Treaty. And the State of California and the lower courts interpret *Sumitomo* to preclude U.S. subsidiaries from presenting claims based on the Treaty, because the subsidiaries are not "companies of" their foreign parent's domicile.

The court's additional ruling that the controversy is unripe, will, if allowed to stand, further impair the Treaty. The court indicated that federal judicial consideration of the Treaty issues should await completion of state tax proceedings in California. However, SPNV is not entitled to participate in those proceedings, and the State of California takes the position that the U.S. subsidiaries have no standing to assert rights under the Treaty in those proceedings. Therefore, the state proceedings do not offer a means of vindicating the rights SPNV seeks to assert under the Treaty. To deny prompt adjudication of the Treaty issues is especially inappropriate where unitary taxation by California and other States has aroused vigorous protests from the Netherlands and other foreign governments, thus disturbing U.S. foreign relations. *See Container Corp. v. Franchise Tax Bd.*, No. 81-523, slip op. at 6-7 n.4 (June 27, 1983) (Powell, J., dissenting). In *Container*, the three dissent-

ing justices expressly stated that the constitutionality of California's unitary tax formula could not be defended as applied to a foreign-based multinational. The five majority justices expressly left this point open when they held the tax constitutional as applied to a U.S.-based multinational. The lower court decisions in *SPNV*, however, bar SPNV from raising either its constitutional claims or its treaty claims.

In the light of these developments, the Netherlands Government strongly urges the U.S. Government to support SPNV's petition for certiorari, and to express to the Supreme Court its views on the aspects of both standing and ripeness. Not only will this help to avoid the confusion that arose from the silence of the U.S. Government in the case of Container Corporation before the Supreme Court, but also the opinion of both States parties to the treaty on the question of the ius standi may well be of great value to the Supreme Court.

The Ambassador of the Netherlands avails himself of this opportunity to renew to the Secretary of State the assurances of his highest consideration.

Washington, D.C.
September 15, 1983

ANNEX B

PERTINENT PROVISIONS OF NETHERLANDS FCN TREATY[1]

Article I(1)

"Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests."

Article VI(3)

"Neither Party shall take unreasonable or discriminatory measures that would impair the rights or interests within its territories of nationals and companies of the other Party, whether in their capital, or in their enterprises and the property thereof, or in the skills, arts or technology which they have supplied."

Article VII(1)

"Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activity for gain (business activities) within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their busi-

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[1] Source: Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942.

ness; (b) either directly or indirectly through one or more intermediaries, to organize companies under the general company laws of such other Party and to acquire the controlling interest in companies of such other Party; (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party."

Article XI

"1. Nationals of either Party residing within the territories of the other Party, and nationals and companies of either Party engaged in trade or other gainful pursuit or in scientific, educational, religious or philanthropic activities within the territories of the other Party, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, within the territories of such other Party, more burdensome than those borne by nationals and companies of such other Party.

"2. With respect to nationals of either Party who are neither resident nor engaged in trade or other gainful pursuit within the territories of the other Party, and with respect to companies of either Party which are not engaged in trade or other gainful pursuit within the territories of the other Party, it shall be the aim of such other Party to apply in general the principle set forth in paragraph 1 of the present Article.

"3. Nationals and companies of either Party shall in no case be subject, within the territories of the

other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third country.

"4. In the case of companies and of non-resident nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories, nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories. A comparable rule shall apply also in the case of companies organized and operated exclusively for scientific, educational, religious or philanthropic purposes.

"5. Each Party reserves the right to: (a) extend specific tax advantages on the basis of reciprocity; (b) accord special tax advantages by virtue of agreements for the avoidance of double taxation or the mutual protection of revenue; and (c) accord to its own nationals and to residents of continguous countries more favorable exemptions of a personal nature with respect to income and inheritance taxes than are accorded to other non-resident persons."

ANNEX C

ARTICLES OF MODERN FCN TREATIES COMPARABLE TO ARTICLES OF NETHERLANDS FCN TREATY RELIED ON BY SPNV [1]

	Netherlands FCN Treaty Articles					
	I(1)	VI(3)	VII(1)	XI(1)	XI(3)	XI(4)
Belgium	1	4(2)	6	9(1)	9(3)	9(4)
Denmark	I	VI(4)	VII, VIII	XI(1)	XI(3)	XI(4)
Ethiopia	VIII(1)	VIII(1)	VIII	X(1)	X(1)	X(3)
France	I	IV(1)	V(1)	IX(1)	IX(2)	IX(4)
W. Germany	I(1)	V(3)	VII(1)	XI(1)	XI(3)	XI(4)
Greece	I	VIII	XII, XIII	XVI(1)	XVI(2)	XVI(3)
Iran	IV(1)	IV(1)	IV(4)	VI(1)	VI(1)	VI(3)
Ireland	V	V	VI	IX(1)(b)	IX(1)(a)	IX(2)
Israel	I	VI(4)	VII(1)	XI(1)	XI(3)	XI(4)
Italy	—	Supp. art. I	II, III	IX(1)(b)	IX(1)(a)	IX(2)
Japan	—	V(1)	VII(1)	XI(1)	XI(3)	XI(4)
S. Korea	I	VI(3)	VII(1)	XI(1)	XI(3)	XI(4)
Luxembourg	I	IV(2)	VI(1)	X(1)	X(3)	X(4)
Nepal	—	—	—	—	—	—
Nicaragua	I	VI(3)	VII(1)	XI(1)	XI(3)	XI(4)
Oman	IV(1)	IV(1)	V	VII(1)	VII(1)	VII(3)
Pakistan	I	VI(3)	VII(1)	XI(1)	XI(3)	XI(4)
Taiwan [2]	—	—	III, IV	X(1)	X(2)	X(1)
Thailand	III(1)	III(1)	IV	VI(1)	VI(1)	VI(3)
Togo	IV(1)	IV(1)	V	VII(1)	VII(1)	VII(3)
Vietnam [3]	IV(1)	IV(1)	V	VII(1)	VII(1)	VII(3)
Yemen	—	—	—	—	—	—

[1] The full citation for each treaty or international agreement referred to in the table is contained at the end of this annex.

[2] Signed in 1946 with the Republic of China, this treaty has been continued in force by Taiwan Relations Act § 4(c), 22 U.S.C. § 3303(c) (Supp. V.1981).

[3] This agreement was in force between the United States and the Republic of Vietnam (South Vietnam). As of January 1, 1983, its status was under review by the U.S. Government. *See* U.S. Department of State, *Treaties in Force* 188 (Jan. 1, 1983).

Sources:

1. Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, 14 U.S.T. 1284, T.I.A.S. No. 5432.

2. Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, 12 U.S.T. 908, T.I.A.S. No. 4797.

3. Treaty of Amity and Economic Relations, Sept. 7, 1951, United States-Ethiopia, 4 U.S.T. 2134, T.I.A.S. No. 2864.

4. Convention of Establishment, Protocol, and Declaration, Nov. 25, 1959, United States-France, 11 U.S.T. 2398, T.I.A.S. No. 4625.

5. Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593.

6. Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, United States-Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057.

7. Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853.

8. Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, 1 U.S.T. 785, T.I.A.S. No. 2155.

9. Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States-Israel, 5 U.S.T. 550, T.I.A.S. No. 2948.

10. Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, 63 Stat 2255, T.I.A.S. No. 1965, Supp. 12 U.S.T. 131, T.I.A.S. No. 4685.

11. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863.

12. Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States-Republic of Korea, 8 U.S.T. 2217, T.I.A.S. No. 3947.

13. Treaty of Friendship, Establishment and Navigation, Feb. 23, 1962, United States-Luxembourg, 14 U.S.T. 251, T.I.A.S. No. 5306.

14. Agreement Respecting Friendship and Commerce, Apr. 25, 1947, United States-Nepal, 61 Stat. 2566, T.I.A.S. No. 1585.

15. Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, 9 U.S.T. 449, T.I.A.S. No. 4024.

16. Treaty of Amity, Economic Relations and Consular Rights, Dec. 20, 1958, United States-Oman, 11 U.S.T. 1835, T.I.A.S. No. 4530.

17. Treaty of Friendship and Commerce, Nov. 12, 1959, United States-Pakistan, 12 U.S.T. 110, T.I.A.S. No. 4683.

18. Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, United States-Republic of China, 63 Stat. 1299, T.I.A.S. No. 1871.

19. Treaty of Amity and Economic Relations, May 29, 1966, United States-Thailand, 19 U.S.T. 5843, T.I.A.S. No. 6540.

20. Treaty of Amity and Economic Relations, Feb. 8, 1966, United States-Togo, 18 U.S.T. 1, T.I.A.S. No. 6193.

21. Treaty of Amity and Economic Relations, Apr. 3, 1961, United States-Republic of Vietnam, 12 U.S.T. 1703, T.I.A.S. No. 4890.

22. Agreement Respecting Friendship and Commerce, May 4, 1946, United States-Yemen, 60 Stat. 1782, T.I.A.S. No. 1535.

MOTION FILED
NOV 10 1983

No. 83-586

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

SHELL PETROLEUM N.V.,
Petitioner,
v.
MICHAEL FRANCHETTI, KENNETH CORY, WILLIAM M. BENNETT, Individually and as Members of, and GERALD H. GOLDBERG, Individually and as Executive Officer of, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE UNITARY TAX CAMPAIGN LIMITED AS AMICUS CURIAE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF OF THE UNITARY TAX CAMPAIGN LIMITED AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, the Unitary Tax Campaign Limited hereby moves this Court for leave to file a brief as *amicus curiae* in the above-captioned case. Counsel for petitioner has consented to the filing of the attached brief by letter on file with the Clerk of this Court. The consent of counsel for respondents was requested but refused. This motion and the

accompanying brief are submitted within the time permitted by Rule 36.1 of the Rules of this Court.

The petition for certiorari presents questions of the standing of a company headquartered in the Netherlands to enforce its rights in U.S. courts under the U.S. Constitution, international law, and an applicable post-war treaty of friendship, commerce and navigation. The attached brief sets forth the significance of this case for the constitutional and other rights of companies headquartered in a country (the United Kingdom) that is not a party to such a treaty.

The interest of the Unitary Tax Campaign Limited as *amicus curiae* is set forth at pages 1-4 of the attached brief.

Respectfully submitted,

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BRIEF OF THE UNITARY TAX CAMPAIGN LIMITED AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of the Unitary Tax Campaign Limited ("UTC") in support of the petition for certiorari. The UTC is an organization of major corporations headquartered in the United Kingdom. It was organized for the express purpose of combatting the use by California and a number of other states of the worldwide unitary tax method—the practice that is challenged by petitioner's complaint in this case. The UTC presents its views to the Court to emphasize the significance to it of the issues presented by this case.

The member corporations of the UTC are among the principal foreign corporations that invest in the United States through subsidiaries incorporated in American states.[1] Of the total of $101.8 billion of foreign direct investment in the United States in 1982, nearly one-quarter—or $23.3 billion—derived from businesses headquartered in the United Kingdom, many of which are UTC members.[2] Businesses based in the United Kingdom earned approximately 40 percent of all income derived by foreign companies from direct investment in the United States.[3] The gross annual turnover of the U.S. subsidiaries of UTC members exceeds $15 billion.

UTC members have been particularly burdened by the double taxation that results from California's worldwide unitary taxation method, and at least two have declined to invest in states employing that method. For example, application of the California worldwide apportionment method during the 1967-1973 period nearly tripled the average effective California tax rate (from 7.27 to 20.99 percent) on the U.S. subsidiary of Unilever Group, the parent of a UTC member.[4] BAT Industries plc, a UTC member that indirectly owns Brown & Williamson Tobacco Corporation and other well-known American companies, has stated to the U.S. Treasury Department that its U.S. subsidiary (BATUS, Inc.) has avoided locating manufacturing plants in California because of the unitary tax burden.[5] And Costain Group plc, a UTC mem-

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[1] Annex A to this Brief lists the members of the UTC supporting the petition for certiorari.

[2] Bureau of Economic Analysis, United States Department of Commerce, *Foreign Direct Investment in the United States in 1982*, 63 Survey of Current Business 31, 32, 36 (Aug. 1983, No. 8).

[3] *Id.* at 40.

[4] Response of BAT Industries plc to U.S. Treasury Department Questionnaire on Worldwide Combined Reporting at 8-9 (June 6, 1982).

[5] *Id.* at 14.

ber, has specifically declined to consider investment in Florida because of that state's recent adoption of the worldwide unitary taxation method.[6]

The UTC has repeatedly expressed its opposition to unitary taxation. It joined several British companies in a brief as *amicus curiae* in *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.*,[7] a case involving application of worldwide combined reporting to U.S.-based multinational businesses.[8] The UTC has also made its views known to the British Government. That Government has made repeated diplomatic protests to the U.S. Government[9] and joined in a brief submitted to the Court in this case by the ten member states of the European Communities as *amici curiae*,[10] all in an attempt to resolve the problem engendered by the aberrational taxing method employed by California. And retaliatory legislation was recently proposed in the British Parliament.[11]

This case involves the right of a foreign parent company to challenge the validity of worldwide unitary taxation in the U.S. courts. The decision below denied standing to petitioner Shell Petroleum N.V., a Netherlands parent company with subsidiaries in the U.S. and around the world, to demonstrate that application of California's unitary tax to its income and that of its U.S. and non-U.S. subsidiaries violates the U.S. Constitution, the

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[6] *See* p. 9 & n.19 *infra*.

[7] 51 U.S.L.W. 3937 (U.S. July 6, 1983) (dismissing appeal).

[8] Brief of *Amici Curiae* Allied Lyons P.L.C., *et al.*, (filed U.S. Jan. 6, 1982) (No. 81-849).

[9] Protests by the British Government to the U.S. Government are set forth in Annex B to this Brief.

[10] Brief of the Member States of the European Communities as Amici Curiae (filed U.S. Nov. 10, 1983).

[11] *See* Notice of Amendment to 1983 Finance (No. 2) Bill to Amend the Income and Corporation Taxes Act 1970, § 497, tabled in the House of Commons July 14, 1983.

Netherlands-U.S. Friendship, Commerce, and Navigation ("FCN") Treaty,[12] and customary international law. Although the denial of standing does not directly affect the treaty rights of British companies,[13] it would, unless corrected by this Court, destroy their rights to obtain an adjudication of the constitutionality (and validity under customary international law) of the controversial unitary tax imposed on their income. Moreover, dismissal of petitioner's complaint for lack of standing means that UTC members, like petitioner, will be unable in the future to vindicate constitutional and international law claims concerning other regulation of their business activity in the United States. The UTC therefore has a significant interest in the disposition of this petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Application of the unitary tax method to the combined incomes of foreign parent companies and their worldwide subsidiaries raises serious constitutional issues. The lower courts' refusal to adjudicate those issues raises an equally important question of the ability of foreign parent companies to vindicate their rights under the U.S. Constitution. Those issues are of great significance to companies, such as the members of UTC, that are based in countries that do not have FCN treaties with the United States. Unless the decision below is reversed, parent corporations

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[12] Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942.

[13] The commercial treaty between the United States and the United Kingdom, in force since 1815, does not contain specific provisions concerning host country taxation and other regulation of companies of the other treaty party comparable to those contained in the modern U.S.-Netherlands FCN Treaty signed in 1956. *See* Convention to Regulate Commerce, July 3, 1815, United States-United Kingdom, 8 Stat. 228, T.S. No. 110; United States Department of State, *Treaties in Force* 178 (Jan. 1, 1988).

located in such countries, as well as companies of countries that are parties to such treaties, may be foreclosed in future litigation from obtaining an adjudication of their rights in the United States.

A foreign parent company should have standing to contest the constitutionality of the worldwide unitary method, because the parent bears the burden of international double taxation and heavy compliance costs imposed by that method. The inability of the parent to obtain an adjudication of the lawfulness of this practice may disrupt mutual international investment and U.S. foreign relations. Foreign parent corporations, without recourse to protect their U.S. business investments in U.S. courts, may reconsider the wisdom of maintaining those investments or of making any future investments. Any chilling of trade and investment activity between the United States and the United Kingdom will inevitably create additional friction between the two governments. And the growing likelihood of retaliatory actions by the United Kingdom or other nations, or of reciprocal rulings against U.S. companies in British courts, could impair the investments of U.S. corporations abroad.

ARGUMENT

The lower courts' decision, if not corrected by this Court, will effectively prevent the adjudication of the lawfulness of a controversial practice that threatens seriously to disrupt international relations and investment activities. The decision therefore should be reviewed now.

I. Application of the Unitary Tax Method to the Combined Incomes of Foreign Parent Companies and Their Worldwide Subsidiaries Raises Serious Constitutional Issues.

As this Court recognized in the *Container* case, California's unitary taxing scheme represents a "serious divergence" from the "accepted international practice" of applying the "arms-length" income allocation method.[14] Although the Court upheld the unitary method as applied to the income of a U.S. parent corporation and its foreign subsidiaries, the majority carefully reserved the issue of whether it was constitutional to apply that method to the income of a U.S. subsidiary, its foreign parent company, and the foreign parent's non-U.S. subsidiaries. The majority expressly recognized that the result might be different in the latter case,[15] and the three dissenting Justices expressed their view that such an application clearly would be unconstitutional.[16]

Petitioner is now attempting to litigate the important constitutional issues left open in *Container*. Petitioner seeks to prove that its income is being subjected to international double taxation because of the divergence between the unitary method and the arm's-length method. In addition, petitioner seeks to distinguish *Container*, and therefore establish that respondents have violated the Foreign

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[14] *Container Corporation of America v. Franchise Tax Board*, 103 S. Ct. 2933, 2951-52 (1983).

[15] *Id.* at 2952 n.26 and 2956 n.32.

[16] *Id.* at 2957-61 (Powell, J., dissenting).

Commerce Clause, by showing that application of the unitary method to the income of foreign parent companies has led to repeated objections by foreign sovereigns and has led to actual and threatened retaliation that harms the foreign relations of the United States.[17] The lower court decisions deny petitioner the right even to attempt such a showing.

II. If a Foreign Parent Company Injured by California's Taxing Method May Not Challenge That Method, No Adjudication of the Serious Constitutional Issues Raised In This Case Will Be Available.

Although the measures that the foreign parent company seeks to challenge in this case are directed nominally at its U.S. subsidiaries, those measures inflict injuries directly on the parent that are separate from the injuries suffered by the subsidiaries. Unless the parent is allowed standing to redress its separate injuries, the serious constitutional issues they raise will never be adjudicated.

It is the foreign parent corporation—not its U.S. subsidiaries—that feels the impact of international double taxation under the unitary taxing method. Much of the income to which California seeks to apply its apportionment formula (and its tax rates) has been earned abroad by the parent or its non-U.S. affiliates and has been taxed in the "home countries" of the parent and those affiliates. The income thus subjected to international double taxation is income to which the U.S. subsidiaries have no direct or indirect right. Although the subsidiaries are injured by the larger tax bill that results from the unitary method, that injury is distinct from the double taxation injury suffered by petitioner.

Similarly, the demands for information and the threat of penalties if it is not supplied injure the foreign parent

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[17] *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

in a way that is separate from any injury suffered by the U.S. subsidiaries. Only the parent has access to much of the extremely detailed information concerning foreign affiliates and transactions that California requires. Only the parent will incur the cost of assembling that information, performing the numerous accounting adjustments and currency conversions necessary to comply with California's tax accounting principles, and supplying the information to its U.S. subsidiaries for ultimate transmission to the Franchise Tax Board. And only the parent will be liable if production of the information violates the laws of its home country.

These injuries may go unredressed if the party suffering them is not allowed access to U.S. courts. The U.S. subsidiaries of petitioner do not have direct access to the information necessary to prove petitioner's claims of impermissible double taxation. That information necessarily lies in the hands of the parent company, such as the taxpayer in the *Container* case. Where, as here, California is attempting to tax the income of the parent by claiming it is part of a "unitary" business with its U.S. subsidiaries, it is illogical to decide the issue of standing by separating the "unitary" business into its separate corporate entities, and thus to deny to the parent company the opportunity to prove that the asserted tax places an unconstitutional double taxation burden on it.

III. The Inability To Obtain An Adjudication of the Lawfulness of California's Unitary Taxing Method Threatens To Disrupt U.S. Foreign Relations and International Investment Generally.

At noted above, California's unitary taxing method has impaired investments made in California by members of the UTC.[18] Foreign investment in the United States could be further affected as additional states adopt the worldwide unitary method, as Florida did just three weeks

[18] *See* pp. 2-3.

after this Court's decision in *Container*.[19] Moreover, under the theory of the decisions below, foreign parent corporations would be unable to invoke the jurisdiction of the U.S. courts for protection from other actions nominally taken against their U.S. subsidiaries that violate the parent corporations' rights under the Constitution and international law. If these disincentives compel foreign companies to curtail their U.S. investments, the United States will lose the benefit of the products, technology, services, and employment associated with such investment.

British Prime Minister Thatcher has personally stressed that she considers the problem a serious one.[20] The United Kingdom and other Governments, including those of the Netherlands, all the other European Community nations, Canada, and Japan have made repeated diplomatic protests to the U.S. Government. And in this case, the United Kingdom has joined the other member states of the European communities in submitting a brief amicus curiae, which the UTC endorses.

There is also an undeniable danger that if the rulings below stand uncorrected, U.S. corporations, as a matter of reciprocity, will be denied standing by foreign courts to assert that tax or other measures against their local subsidiaries violate the parents' rights under applicable domestic law. Even more direct reprisals have already been proposed. An amendment to the 1983 Finance (No. 2) Bill was introduced in the British Parliament that would have denied certain tax credits to U.S. corporations established or having an affiliate established in a state

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[19] *Florida's Legislature Is Latest to Approve Unitary Tax Law*, Wall St. J., July 29, 1983, at 29, col. 1. Besides California and Florida, ten other states currently employ the worldwide unitary method. *Id.*

[20] Lewin, *Unitary Tax Scope Widens*, N.Y. Times, Oct. 18, 1983, at D2, col. 1.

that employs the worldwide unitary tax method.[21] Other nations also may consider or take retaliatory actions against American businesses. If other countries imitate the taxing method employed by California, a breakdown of the worldwide consensus in favor of the arm's length approach, and further disruption of international investment, could follow.

CONCLUSION

For the reasons stated in this brief, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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(Counsel of Record)
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Counsel for the Unitary Tax Campaign Limited as Amicus Curiae

November 10, 1983

[21] Notice of Amendment to 1983 Finance (No. 2) Bill to Amend the Income and Corporation Taxes Act 1970, § 497, tabled in the House of Commons July 14, 1983.

ANNEXES

ANNEX A

MEMBERS OF UTC SUPPORTING PETITION FOR CERTIORARI

Allied-Lyons plc
Barclays Bank plc
Barratt Developments plc
BAT Industries plc
The BOC Group plc
Bowater Corporation plc
Bunzl plc
The Charterhouse Group plc
Costain Group plc
Dalgety plc
Dunlop Holdings plc
Foseco Minsep plc
Harrisons and Crosfield plc
The Hundred Group of Chartered Accountants
Imperial Chemical Industries plc
Imperial Group plc
Lead Industries Group plc
Lloyds Bank plc
London Chamber of Commerce and Industry
Midland Bank plc
National Westminster Bank plc
The Plessey Company plc
Reckitt and Colman plc
Redland plc
Reed International plc
Sears Holdings plc
Sedgwick Group plc
Tate and Lyle plc
Transport Development Group plc

ANNEX B

CORRESPONDENCE FROM BRITISH GOVERNMENT TO U.S. GOVERNMENT CONCERNING STATE UNITARY TAXATION

[SEAL OF CHANCELLOR OF THE EXCHEQUER]

Treasury Chambers, Parliament Street, SW1P 3AG
01-233 3000

12 July 1983

The Honourable Donald T Regan
Secretary to the Treasury
Washington, DC

Dear Mr. Regan

I am writing to you on the subject of unitary taxation following the recent decision of the United States Supreme Court in the case of Container Corporation of America v The California Franchise Tax Board, upholding the right of a state to use the worldwide combined unitary method of taxation. This method carries a high risk of double taxation, and imposes on international companies a heavy administrative burden. As you know this is a subject on which my predecessor and other colleagues have expressed strong views to you on a number of occasions. It is an issue of considerable concern to Parliament and the British business community.

After the filing of an amicus curiae brief in the Chicago Bridge and Iron case by the United States Solicitor General, we advised British companies to await the Supreme Court's decision before making further representations. We were therefore naturally disappointed with the ruling in the Container case. When these issues do arise it seems to us important that an amicus curiae brief is filed, and I wonder whether the lack of such a brief

might have been a factor in this case. I appreciate that the latest decision does not apply to United States Corporations with foreign parents, which is the issue of most concern to us. However the consequence seems to be that there is little prospect of this particular issue being tested in the Supreme Court in the near future.

I understand that at your meeting on 7 July with the British Ambassador you said that you would probably consider legislative action as a result of the decision. In the circumstances I would welcome this. Following the reservation of the United States Senate on Article 9(4) of the Double Taxation Convention, there were as you know, some misgivings here, when the Convention came before Parliament for ratification in 1980. Nonetheless ratification was approved in the expectation that action by the Administration to eliminate the practice was in hand.

I should be interested to know how you see this developing, and to learn of your proposed timetable. You will of course be aware that this is a matter where there is strong pressure in Parliament. We are keen for the matter to be resolved as soon as possible before possible harm is done to the good relations between our two countries. I hope we shall have an opportunity to let you have our views of any legislation you may be preparing. Geoffrey Howe, who of course also has a close interest in this subject, will see you in Washington this week and looks forward to having further discussions on this with you.

Yours sincerely
/s/ Nigel Lawson

NIGEL LAWSON

BRITISH EMBASSY

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17 December 1981

The Honorable Donald T. Regan
Secretary of the Treasury
Department of the Treasury
Room 3326
Main Treasury Building
15th & Pennsylvania Avenue N.W.
Washington, D.C.

Dear Mr. Secretary,

UNITARY TAXATION

I have been asked to deliver to you the attached text of a letter from the Chancellor of the Exchequer of the United Kingdom, on the subject of unitary taxation as it arises in the United States Supreme Court case between Chicago Bridge and Iron Company and Caterpillar Tractor Company/Illinois Department of Revenue.

The top signed copy will follow in a day or so.

Yours sincerely,

/s/ Harry G. Walsh
H. G. WALSH
Counsellor (Economic)

ATTACHED: TEXT.

Letter from the Rt. Hon. Sir Geoffrey Howe, Q.C. M.P., Chancellor of the Exchequer, to The Honorable Donald T. Regan, Secretary of the Treasury.

UNITARY TAXATION

As I mentioned when I saw you on 28 September, the United Kingdom is much concerned about the use of the unitary basis of taxation which is being increasingly adopted by individual US States. The problem is that, while business profits earned outside the US by a UK company operating or having affiliates in the US are not subject to US Federal Tax under our tax treaty, they are subject to taxation in some States. We have in the past requested the US Treasury to take action at the Federal level to remedy this unsatisfactory situation.

It has come to my attention that the Supreme Court has now chosen to hear a case (Chicago Bridge and Iron Company versus Caterpillar Tractor Company/Illinois Department of Revenue) which involves the issue of whether the worldwide combined basis applied at State level is acceptable as a method of company taxation under the US Constitution. While I do not presume to anticipate the Court's eventual decision, this case seems to provide an early opportunity for it to curb the use of the worldwide combined basis for taxing company profits. The continuation of this practice would seem to conflict with the ability of the US Government to speak with one voice on international issues, a requirement which has already been clearly recognised by the Court in the 1979 Japan Line case.

Taxpayers in our two countries, who are potentially subject to both US and UK taxation, receive substantial benefits under our double taxation agreement. This provides for a fair and symmetrical method of attribution of company profits, as between our respective national jurisdiction, to avoid the risk of double taxation of the same income. The benefits of the Treaty are now being

reduced, and the risk of double taxation increased, because some American States do not adhere to the method of attribution agreed at national level for the benefit of our business taxpayers.

I understand that you intend to find a means to put before the Court the US Treasury view that the worldwide combined basis is an arbitrary method of attributing profits, which involves excessive compliance costs for foreign multinational companies established in those states where it is used. It also introduces an undesirably asymmetric element into the tax relationship between our two countries, since the unitary basis of taxation with worldwide combined reporting is not used by the UK at any level of government. This imbalance is causing increasing concern, not only on the part of British companies which have made representations about it, but in Parliament where Questions have been asked. My purpose in writing is to assure you that you have the firm support of the UK Government in putting forward the US Treasury view in this case.